A

PP

v.

MOHD KHAYRY ISMAIL

B

HIGH COURT MALAYA, KUALA LUMPUR
SU GEOK YIAM J
[CRIMINAL TRIAL NO: 45-93-2010]
22 JUNE 2013

C

CRIMINAL LAW: *Murder - Section 302 of Penal Code - Circumstantial evidence - Charges of two counts of murder - 'Mercun bola' hidden in gift - Accused in heavy debt with deceased persons - Deceased persons owned internet cafe where accused frequented to indulge in online gambling - Accused's request for loan denied by deceased - Prior*

D

threat - Proximity of time between threat and incident - Witness evidence that accused showed desire to burn internet cafe and its owners three months prior to incident - Whether accused had motive to kill deceased persons

E

CRIMINAL PROCEDURE: *Trial - Defence story - Whether afterthought - Whether defence story put to prosecution's witnesses - Whether defence plausible and cast reasonable doubt on prosecution's case - Whether accused had motive to kill - Whether court had reason to reject evidence of accused's friends to whom he made confessions - Whether*

F

CCTV recording identified accused leaving bag where bomb exploded - Whether deceased persons intended victims - Whether accused liable - Penal Code, s. 302

The accused, Mohd Khayry Ismail, a self-employed telecommunications contractor, was charged with two counts under s. 302 of the

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Penal Code for murdering two of the three owners of an internet café which he frequented to indulge in online gambling. The prosecution contended that he owed the café a huge gambling debt; that he was angry with that fact and had made known to his friends that he wanted to set fire to the café and its owners;

H

and that when his request to one of the co-owners, NSH, for a RM20,000 loan was denied, he had threatened her by saying "tomorrow you will see!". The prosecution adduced evidence to show that in the weeks prior to the murders, the accused had on different occasions told two of his friends, PW17 and PW11, that

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he was angry because he was losing money heavily at the internet café and that he wanted to burn it down and burn its "towkay" as well. Besides NSH, who was a 51-year-old woman, the other

co-owner of the café who was also killed was a 34-year-old man, GYS. Both of them also worked at the café. The third co-owner, PW9, and NSH shared a flat on the 12th floor of an apartment block on the ground floor of which the internet café was located. The accused had a close relationship with NSH and PW9 and he used to buy NSH gifts, especially pomelos, whenever he returned from outstation trips. Despite his debts with the café, NSH had allowed the accused to continue gambling on credit. The prosecution's narrative was that shortly after his request for the RM20,000 loan from NSH was turned down, and about an hour after the accused left the café at about 2am, an employee who was closing the café noticed the accused carrying a blue bag walking towards the lift of the apartment block where NSH stayed. A CCTV camera recording showed the accused entering the lift on the ground floor, getting off at the 12th floor while still holding the bag and several seconds later re-entering the lift without the bag and then leaving the lift at the ground floor. Later the same morning, NSH and PW9 found a blue bag containing a box with two pomelos on top of it, outside their flat. They smelt petrol emanating from the box. Perplexed as to how the package got there, the two of them went down to the internet café to ask GYS about it. The three of them then came up to the flat. GYS and NSH were the first to reach the bag and when GYS lifted one of the pomelos, there was a loud explosion and both GYS and NSH were engulfed in flames and were screaming in pain. They were rushed to hospital but died from serious burn injuries. Police recovered from the scene pieces of the blue plastic bag, 'mercun bola', two pomelos, cable ties and wires, traces of petrol and partially burnt paper. Police arrested the accused 26 days later as he was found to be staying at the house of a friend, PW16, after telling him that his wife had chased him out of the house for having an extra-marital affair. PW16 and another friend of the accused, PW13, testified at the trial that the accused had confessed to committing the crime at NSH's apartment. Following the accused's arrest, the police found that he had purchased two pomelos from a supermarket several hours before the murders took place. In his defence the accused, *inter alia,* said he had no motive to kill any of the owners of the internet café as NSH and PW9 were his friends whilst he did not know GYS. He denied owing the café a substantial gambling debt. He also said he did not have the know-how to make a bomb and that the prosecution had failed to prove he had such expertise. He agreed that he did

A place a bag outside NSH's apartment that morning but that it only contained two pomelos and pickles he wanted to give her as a gift as she had earlier given him some cash on learning of his father's death and had also given him three hampers for the approaching Hari Raya Puasa celebrations. He suggested someone else who
B was unhappy with the activities at the café might have placed the bomb in the bag as there was a five-hour interval between the time he left the bag outside the apartment and the explosion. The accused denied he ever told his friends he wanted to set fire to the café or to harm its owners.

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Held (convicting accused on both charges of murder and sentencing him to death):

(1) The court found as a fact that the accused had a motive to kill NSH and PW9. He had an axe to grind with them as
D there was overwhelming evidence he had gambled and lost heavily in the internet café. The accused was angry with NSH and PW9 and there was cogent and positive evidence from PW11 and PW17 that he wanted to bomb the 'towkay' of the café and NSH and to set fire to her and the café. When
E his request for a substantial loan from NSH on the eve of the incident was rejected, the accused must have felt betrayed as he had a close relationship with her and he felt NSH had only profited from that relationship. (para 356)

F **(2)** The warning with the implicit threat that something bad would befall NSH the following day was uttered directly by the accused to NSH on the eve of the incident, at 8pm, and related by NSH to PW9. This evidence was clearly admissible as her dying declaration. In terms of the close proximity of the
G time between the threat and the incident, there was a sufficiently strong nexus between the two events. (para 356)

(3) The accused's defence that he had gone up to NSH's house about 3.09am to deliver a bag containing pickles and pomelos
H was clearly an afterthought kept up his sleeve and sprung onto the prosecution as a surprise during the defence's case. That defence was never put to any of the prosecution's witnesses during the prosecution's case. No one in his right mind would send such gifts in the wee hours of the morning in such
I fashion without even alerting the intended recipient about the gifts. The accused had NSH's phone number but he admitted

he did not call her to tell her about the gifts. This part of the accused's story was highly unlikely and was clearly created to extricate himself from the murder charges. (para 356)

(4) The court found there was no reason for any of the prosecution witnesses, including the accused's friends, to frame him on the two murder charges and to lie to the court. The accused denied ever admitting to PW13 and PW16 that he had placed the bomb in front of NSH's apartment whereas their sworn testimonies were strongly positive and cogent and remained unshaken during cross-examination. No good reason was offered by the accused to explain away their testimonies (paras 356 & 363)

(5) The accused displayed guilty behaviour and conduct on the CCTV recording. When he was walking back to the lift on the 12th floor without the bag he was leaning his body against the wall and he went into the lift with his face concealed by the wall like someone who was fully aware he had done something serious and very bad. The evidence also showed the accused took steps to ensure his movements after the incident could not be detected by the police. (paras 356 & 363)

(6) It was highly unlikely and improbable that someone else could have made and placed the pomelo bomb in front of the apartment. The defence's case was not plausible and failed to cast a reasonable doubt on the prosecution's case. In all probability, the act must have been done by the accused and the accused alone. (para 366)

(7) The court did not entertain any doubt whatsoever that it was the accused who intentionally caused the death of NSH and unintentionally caused GYS's death by first making and then leaving the pomelo bomb outside the apartment where NSH and PW9 resided with the full knowledge that if either one or both of them lifted up the pomelos the bomb would explode to cause them such severe and grave injuries as would cause their deaths. The fact that it was GYS, and not PW9, who was killed together with NSH did not, in any way, reduce the accused's culpability on the two charges. (paras 367 & 368)

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***
Chandmal & Anor v. State of Rajasthan AIR 1970 SC 917 ***(refd)***
Chang Kim Siong v. PP [1967] 1 LNS 18 FC ***(refd)***
Hanumant Govind Nargundkar v. State of Madhya Pradesh AIR 1952 SC 343 ***(refd)***
Jayaraman & Ors v. PP [1981] 1 LNS 129 ***(refd)***
Karam Singh v. PP [1967] 1 LNS 65 FC ***(refd)***
Liew Kaling & Ors v. PP [1960] 1 LNS 60 HC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP lwn. Ho Sek Kong [2006] 5 CLJ 49 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
R v. Podmore 22 Cr App R 36 ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(4), 182A(2), 277
Evidence Act 1950, ss. 8, 17(2), 45, 112, 114(g)
Penal Code, ss. 299, 300, 301, 302

Other source(s) referred to:
Drs Awang Sudjai Hairul & Yusoff Khan, *Kamus Lengkap*, p 909

For the prosecution - Ahmad Akram Gharib (Faezah Mohd Salleh with him); DPPs
For the accused - Hanif Hashim (Amirul Redzuan Hanif with him); M/s Hanif & Co

Reported by Ashok Kumar

JUDGMENT

Su Geok Yiam J:

Background

[1] The accused was charged with two counts of murder (P2) for causing the deaths of two persons.

[2] The deceased person named in the first count is Ng Siew Hong (IC No.: 590113-01-5966) ("NSH"). She is a middle-aged Chinese woman who was 51 years, seven months and 18 days old at the time of her death on 30 August 2010. Prior to the incident which resulted in her death, NSH was the co-owner of an internet café. She was also working in the internet café as the manager of the internet café.

[3] The internet café is located on the ground floor of Block 2 of a block of apartments known as Apartment Desa Tun Razak, Jalan 8/11B, Desa Tun Razak, in the Cheras district in the Federal Territory of Kuala Lumpur (the "internet café"). The two other co-owners are Mr Lim Swee Kheng (PW9) and the deceased person named in the second count. PW9 and NSH are the major shareholders whereas the deceased person in the second count owns only a small share which was given to him by NSH.

[4] The deceased person named in the second count is Goh Yong Seng (IC No.: 750-08-05-5176) ("GYS"). He is a young Chinese man who was aged 34 years, 11 months and 24 days at the time of his death on 31 August 2010. Prior to the incident which resulted in his death, apart from being one of the three co-owners of the internet café, GYS also worked at the internet café.

[5] PW9, NSH and GYS had been operating the internet café without a licence for about two or three years prior to the incident. The internet café also allows its patrons to conduct illegal gambling including online gaming on the internet casino subject to payment in cash in advance. The patrons comprise adults who work in the private and public sector.

[6] Both PW9 and NSH share an apartment. It is apartment No: 2-12-4, on the 12th floor of the same block, ie, Block 2 of Apartment Desa Tun Razak (the "apartment").

[7] As the manager of the internet café, NSH is usually at the internet café during the day time. During the night time, she is in her apartment. If there is any need for her to attend to any matter in the internet café, she will go down to the internet café to deal with it.

[8] The internet café has two sections. They are the internet section, where there are personal computers, which are connected to the internet for the use of its patrons, and the café section, where food and beverages can be bought and consumed by the patrons.

[9] There are three workers who were in charge of the internet section at the time of the incident. They are Encik Isni Faizul bin Zamri (PW12), also known as "Aji" and two Indonesian workers, a man and a woman. However, the two Indonesian workers have returned to Indonesia after the incident.

[10] Prior to his sudden demise as a result of the fatal injuries suffered by him in the incident, GYS was in charge of the café section.

[11] The accused is a telecommunications contractor. He is one of the regular patrons of the internet café.

[12] This case is tragic because there was no evidence of any enmity or bad blood or misunderstanding between the accused and GYS prior to the incident. As for NSH it is common knowledge that the accused and NSH enjoyed a close relationship prior to the incident. He also used to call her "Kakak" in Malay which means "Elder sister" in English. NSH used to call the accused "Adik" in Malay which means "Younger brother" in English. The accused also used to buy her gifts of fruit, ie, pomelos, whenever he returned from his outstation trips to Penang.

[13] The offence of murder is punishable with the mandatory death penalty in s. 302 of the Penal Code.

The Two Counts Of Murder

[14] The first count states as follows in the Malay language:

> PERTUDUHAN PERTAMA:
>
> Bahawa kamu pada 29 Ogos 2010 di antara jam lebih kurang 8.00 pagi dan 8.30 pagi, di hadapan rumah No. 2-12-4, Apartment Desa Tun Razak, Blok 2, Jalan 8/118B, Desa Tun Razak, di dalam daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, telah membunuh NG SIEW HONG (No K/P: 590113-01-5966), oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan

[15] In English, the first count charges the accused with having murdered NSH (also known as "Aunty") on 29 August 2010, at about 8am to 8.30am, in front of the apartment.

[16] The second count states as follows in the Malay language:

PERTUDUHAN KEDUA:

Bahawa kamu pada 29 Ogos 2010 di antara jam lebih kurang 8.00 pagi dan 8.30 pagi, di hadapan rumah No 2-12-4, Apartment Desa Tun Razak, Blok 2, Jalan 8/118B, Desa Tun Razak, di dalam daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, telah membunuh GOH YONG SENG (No K/P: 750908-05-5176), oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[17] In English, the second count charges the accused with having murdered GYS (also known as "Ah Ti") on the same date, at the same time, in front of the apartment.

The Prosecution Case In A Nutshell

[18] The prosecution case against the accused rested on circumstantial evidence and two confessions made to two prosecution witnesses (PW13 and PW16).

[19] The prosecution case in a nutshell is as follows:

(1) About three months prior to the incident, the accused angrily told his former employee (PW17), about his desire to set fire to the internet café on account of his gambling losses at the internet café.

(2) About one month before the incident, the accused repeated the same desire to PW17. He used the following words:

Ah Soh ni, aku bakar. Jugalah kedai dia.

(3) The words are in Malay which means "This Ah Soh I will burn. As well as her shop" in English.

(4) About a month before the incident, the accused had also expressed to his friend (PW11) his desire to bomb the towkay of the internet café, ie, PW9 and Ah Soh, ie, NSH. About a week before the incident, he repeated the same desire to PW11.

(5) About a month prior to the incident, the accused had also obtained two packets of "mercun bola" through his former employee (PW18).

(6) At 8pm, on the night before the incident, the accused had requested a loan of RM20,000 from NSH. When she refused to give him the loan he warned NSH in the following words:

Kalau tak beri pinjam besok kamu tengoklah.

The words are in Malay which means "If you do not give the loan, tomorrow you will see" in English.

(7) At about 3am, on the date of the incident, ie, on 29 August 2010, PW12 saw the accused carrying a blue coloured bag walking towards the lift.

(8) The movements of the accused as he was entering one of the lifts at 3.09am, on the date of incident, while carrying a bag was captured by the CCTV recording. The CCTV recording also captured his image as he stepped out of the lift at the 12th floor, still carrying the bag. A short while later, the CCTV recording also captured his image as he walked back to the lift empy-handed and as he walked out of the lift on the ground floor.

(9) On the morning of the incident, PW9 was woken up from his sleep by NSH whom he calls "Aunty". NSH informed him that there was a box with pomelos outside their apartment. NSH asked PW9 whether he had purchased the pomelos. PW9 replied that he did not.

(10) Both of them then went outside to have a look. PW9 saw a blue coloured plastic bag with a box inside and on top of the box were two pomelos. PW9 could sniff the smell of petrol emanating from the box. He then saw NSH opening the box slightly and NSH said she could also sniff a smell like the smell of petrol.

(11) Both of them then went downstairs to the internet café where NSH asked GYS (whom PW9 and NSH both call "Ah Ti") whether he had ordered the pomelos.

(12) Ah Ti replied that they could ask the opposite neighbour whether he had bought the pomelos. If the opposite neighbour did not, then they could just take them and eat them.

(13) At about 8.30am, after the three of them had gone upstairs to the 12th floor, to the front of the apartment, PW9 saw that the bag was still there. GYS and NSH reached the bag first because PW9 had a bad leg. PW9 was following slightly behind them. Nevertheless, he was able to witness what happened after that.

(14) When GYS lifted up one of the two pomelos, PW9 saw petrol on GYS's face. PW9 also saw fire. He also heard a loud explosion. He also saw GYS and NSH on fire. At the same time he could hear them screaming out in pain.

(15) Both of them were taken to the hospital in an ambulance but both died from the serious injuries which they suffered as a result of the fire and explosion. NSH died a day after the incident while GYS died two days after the incident.

(16) The doctor who attended to GYS after his admission into the hospital heard GYS saying "Ada bomb! Ada bomb!" in Malay which means "There is a bomb! There is a bomb!" in English.

(17) Among the items recovered from the scene of the incident by the forensic police were pieces of "mercun bola", pieces of the box, pieces of blue coloured plastic, the two pomelos and two cable ties which were tied to a wire which was inserted inside one of the pomelos.

(18) The forensic police also found traces of petrol on one of the items, ie, a piece of partially burnt paper.

(19) The bomb expert was of the opinion that the object which caused the fire and explosion was an improvised explosive device (IED) which used the two pomelos in order to attract the interest of the person who was the target and upon the target lifting up the two pomelos the IED was triggered off.

(20) I shall refer to the IED as the pomelo bomb.

(21) A day after the incident, ie, on 30 August 2010, upon obtaining the permission of Suhailee bin Abdullah, PW13 and PW16, the accused went to stay with PW16 until his arrest by the police on 24 September 2010.

(22) During his stay with PW16, the accused made two confessions, one to PW13 and another one to PW16. In both the confessions the accused said that he was the one who had caused the fire and explosion at the apartment.

(23) The accused was arrested 26 days after the incident, ie, on 24 September 2010, at 5.55am, by PW36 in a raid on PW16's house which was led by SUPT G/9463 Sahadan bin Jaafar which involved three officers (Insp Ng Man Fatt, PW35 and PW36) and 19 men.

(24) After his arrest, on 24 September 2010, at 9.15pm, PW35 took the accused back to PW16's house together with PW34, the second forensic investigating officer, where PW34 found and PW35 seized, the accused's laptop computer (P78B) and a green coloured computer bag (P74A) in which were found a cable wire, a wire cutter (P61A) and the keys (P75A) to a Proton Saga car (the "car") as shown in photographs P6 (1 and 2).

(25) The accused then led PW35 and PW34 to the car park area of the Sungai Buloh Hospital, at 10.15pm, on the same day, where he showed to them the car which PW34 opened with the keys (P75A). PW34 found a plastic packet containing a quantity of white coloured cable ties (P67B) on the foot rest area of the left rear passenger seat and a screw driver with a green handle (P76A) on the foot rest area of the driver's seat. PW35 seized these items.

(26) The accused then led PW35 and PW34 to his house at No. 4, Jalan Makmur, Bandar Tun Razak, at 11.30pm, on the same day, and to the balcony of the first floor where PW34 found a small saw with a yellow coloured handle (P68A), a red coloured plastic bag containing five packets of matches (P77A to E) and a 1.50 metre length of an electrical casing (P77). PW35 seized these items.

(27) On the following day, ie, 25 September 2010, at 9pm, the accused led PW36 to the Giant Supermarket in Taman Connaught (the "Giant Supermarket") where he had purchased two pomelos and a screwdriver on the eve of the incident, at 8.39pm. The purchase was captured on the CCTV recording at the counter where he had made payment to the cashier (PW26) for his purchases.

Section 180(4) Of The Criminal Procedure Code And ss. 300 And 301 Of The Penal Code

[20] The law is trite concerning the burden of the prosecution at the close of the prosecution case. It is the burden to establish a *prima facie* case.

[21] In order to establish a *prima facie* case against the accused the prosecution must prove by way of credible evidence as mandated by s. 180(4) of the Criminal Procedure Code ("CPC") all the ingredients of each of the two counts of murder (P2).

[22] Section 299 of the Penal Code sets out the ingredients for the offence of culpable homicide. The section provides as follows:

CHAPTER XVI

OFFENCES AFFECTING THE HUMAN BODY

Offences Affecting Life

Culpable homicide

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

ILLUSTRATIONS

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence, but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

[23] Section 300 of the Penal Code sets out the ingredients for the offence of murder. The section provides as follows:

Murder

Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[24] Section 301 of the Penal Code sets out the ingredients of the offence of culpable homicide where the offender causes the death of a person other than the person whose death was intended.

[25] The section provides as follows:

Culpable homicide by causing the death of a person other than the person whose death was intended

301. If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which if he had caused the death of the person whose death he intended or knew himself to cause.

[26] The following excerpts from the comments in *Ratanlal and Dhirajlal's Law of Crimes*, 26th edn., on s. 301 of the Penal Code are relevant to the facts of the instant case:

COMMENTS

1. **Principle**. – The doctrine inculcated in this section is called, by Hale and Foster, a transfer of malice. Other describe it as a transmigration of motive. Coke calls it coupling the event with the intention and the end with the cause. *If the killing take place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if the real intention of the killer had been actually carried out.*

   "It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the Judges call general malice, and that is enough".

   In *Halsbury's Laws of England*, it has been stated:

   "Where a person intends to commit a particular crime and brings about the elements which constitute that crime, he may be convicted notwithstanding that the crime takes effect in a manner which was unintended or unforeseen."

2. *'Transfer of malice'. – The Supreme Court has held that this section embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. The earliest case which laid down the doctrine of transferred intention in case of murder is Gore's case* [9 Co Rep 81:77 ER 853].

   Under this section if A intends to kill B but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law attributed to him. If A aims a shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person. C whether within sight or out of sight, under this section A is deemed to have hit C with the intention to kill him.

   …

3. Scope. – The provision clearly shows that if the killing took place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if real intention of the killer had been actually carried out (see *Raj Bir Singh* [2006] 4 SCC 51).

A This section has given rise to a difference of opinion as to its scope. In a Madras case, ie [*Public Prosecutor v. Suryanarayanamoorty* (1912) MWN 136, 139, 143, 149: 22 MLJ 333, 338, 343, 352: (1912) 13 Cri LJ 145, 147, 150, 154, 155 (SC)] the accused, S, with the intention of killing
B A, on whose life the accused had effected large insurances without his knowledge and in order to obtain the sums for which he was insured, gave him some sweetmeat (halva) in which a poison had been mixed. A without the knowledge of the accused and ate it and gave some to another little child who transportation for life by the Sessions Judge for
C having attempted to murder A, but was acquitted on the count of murdering the two children. On appeal against the acquittal Benson and Abdur Rahim, JJ, held that the accused was guilty of murder, but Sundara Aiyar, J, held that he was not.

D Benson, J, observed: "The section does not enact any rule not deducible from the two preceding sections, but it declares in plain language an important rule deducible, was we have seen, from those sections, just an as explanation to a section does. The rule could not well be stated as an
E explanation to either section 299 or section 300 as it relates to both. It was, therefore, most convenient to state the rule by means of a fresh section. The rule make it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely, to kill, a rule which though it does not
F lie on the surface of section 299 yet is, as we have seen, deducible from the fenerality of the words 'causes death' and from the illustration to the section; and the rule then goes on to state that *the quality of the homicide, that is whether it amounts to murder or not, will depend on the intention or*
G *knowledge which the and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of the section 299 and 300, though not, perhaps, lying on their very surface.*"

…

H Abdur Rahim, J, observed: "Obviously it is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result as it often happens is due to series to causes. We have to consider in each then to say whether responsibility should be assigned to a particular act or not as the
I proximate and efficient cause. But it may be observed that it cannot be a sufficient criterion in this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea

of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intervention of the act of voluntary agent must necessarily absolve the person between whose act and the result it intervenes. For instance, if A mixes poison in the food of B with the intention of killing B and B eats the food and is killed thereby, A would be guilty of murder even though the eating of the poisoned food which was the voluntary act of B intervened between the act of A and B's death. So here the throwing aside of a sweetmeat by Appala Narasimhulu and the picking and the eating of it by Rajalakshmi cannot absolve the accused from responsibility for his act. No doubt the intervening acts or events may sometimes be such as to deprive the earlier act of the character of an efficient cause."

The Allahabad High Court has agreed with the majority view in the *Madras* case. A woman was carrying on an intrigue with a man who gave her some poison to administer to her husband. She prepared sweetmeats mixed with the poison which were eaten by one M who died as the result thereof. The husband and three others also partook of the sweetmeats and suffered considerably but did not die. She however, intended to kill her husband and not M. It has held that she was guilty of murder (see *Jeoli* AIR 1917 All 455: (1916) 17 Cri LJ 505 (All) distinguished in *Khelawan* AIR 1927 All 104: (1926) 27 Cri LJ 1400 (All), so far punishment is concerned).

4. Conditions. – For applicability of section 301, the act must amount to culpable homicide. If the act is not culpable, the section will have no operation even if it results into homicide of an innocent person (see *Wassan Singh* 1996 Cri LJ 878 (SC): (1996) 1 SCC 458: 1996 SCC (Cri) 119).

7. Cases. – Where the accused intending to kill the husband of a woman, with whom he was carrying on an adulterous intrigue, waylaid him in the dusk, but by mistake killed a third party who came along the road; (*Government v. Govinda Ballajee* (1828) 1 M Dig N S 125. See also *Public Prosecutor v. Islavath Fakeeraya* 1967 Cri LJ 1407) where the accused intending to kill B, killed A by a blow with a highly lethal weapon whom he had no intention of killing; (*Phomonee Ahum* (1867) 8 WR (Cr) 78; Suba AIR 1929 Lah 344: (1927) 29 Cri LJ 280 (Lah) where the accused gave some poisoned rice-water to an old woman who drank part herself and gave part to a little girl who died from the effect of the poison, ((1869) 12 WR (Cr L) 2; *Hari Shankar* 1980

A SCC (Cri) 107: (1979) 4 SCC 501: AIR 1979 (NOC) 157) it was held in all these cases that the offences committed was that of murder. Where the second accused procured oleander seeds and gave them to the first accused so that he might administer them to A in order to kill her in furtherance of a common intention, and the first accused B crushed the seeds and mixed the powder and some arsenic in buttermilk and gave the buttermilk to A but the buttermilk was drunk by B and he died, it was held that both the accused were guilty under this section (see *Boreddi Kondamma* AIR 1948 Mad 293: (1948) 49 Cri LJ 360 C (Mad).

Where the accused intended to cause injuries by firearm to 'H' and in attempting to carry out the same, also caused injuries to 'P' who was accidently hit, section 301 can be held applicable (see *Raj Bir Singh* (2006) 4 SCC 51).

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But in *Wassan Singh* (1996) Cri LJ 878 (Supreme Court): (199) 1 SCC 458: 1996 SCC (Cri) 119: (1995) 8 JT 434: (1995) 4 Crimes 587 (SC), A fired one shot from his gun in exercise of his right of private defence. The bullet missed the target and killed an innocent person. The Supreme Court E held that since A had a right of private defence, he could not be held guilty of an offence punishable under section 304, part I of the Code and his conviction was liable to be set aside. (emphasis added).

F **[27]** Therefore, based on the doctrine of transfer of malice or the transmigration of motive, contained in s. 301 of the Penal Code, if the intention of the accused was to kill PW9 and NSH or cause injuries to PW9 and NSH which are likely to cause their deaths, but the accused caused the deaths of NSH and GYS G instead of NSH and PW9, s. 301 is applicable and the accused can, nevertheless, be found guilty and convicted under s. 302 for the murder of GYS.

[28] In view of the provisions of ss. 299, 300 and 301 of the H Penal Code as set out above and the particulars which are specified in the two counts of murder (P2), it is, therefore, incumbent on the prosecution to prove the following ingredients:

(a) The death of NSH for the first count and the death of GYS for the second count;

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(b) Such death has been caused by, or in consequence of, the act of the accused;

(c) In respect of the first count, such act was done with the intention of causing NSH's death; or it was done with the intention of causing such bodily injury as (a) the accused knew to be likely to cause NSH's death; or (b) was sufficient in the ordinary course of nature to cause NSH's death; or the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) NSH's death, or (b) such bodily injury as is likely to cause NSH's death, the accused having no excuse for incurring the risk of causing such death or injury to NSH; and

(d) In respect of the second count, such act was done with the intention of causing NSH's and PW9's deaths; or it was done with the knowledge that such act was likely to cause NSH's and PW9's deaths; but the act caused the death of GYS although the accused neither intended nor knew himself to be likely to cause GYS's death.

The Prosecution's 40 Witnesses

[29] The prosecution called 40 witnesses in its effort to adduce oral, documentary and physical evidence of each ingredient of the two counts of murder in order to discharge its burden of establishing a *prima facie* case against the accused in respect of the two counts of murder.

[30] The 40 witnesses are as follows:

PW1 is Konstable Zati Hayat Zamani Bin Azlan (A police photographer).

PW2 is LKpl 124474 Masiri Bin Lintaliban @ Dolusim (A police photographer).

PW3 is Kpl 102266 Mukhtasham Bin Mohamad (A police photographer).

PW4 is LKpl 150739 Mohamad Shahrul Nizam Bin Adnan (A police photographer).

PW5 is Kpl 116499 Ariffin Bin Ismail (The Enquiry officer at the Sg. Besi Police Station).

PW6 is Sgt 105569 Saodah Binti Mohd Taib (The police officer who took down the first information report).

PW7 is Mr. Goh Sang Huat (GYS's father).

PW8 is Encik Hakimi Kng Yong Soon (NSH's son).

PW9 is Mr. Lim Swee Kheng (NSH's and GYS's employer).

PW10 is Dr. Faridah Binti Mohd Nor (The Forensic Pathologist Specialist).

PW11 is Encik Abdul Rahman Bin Abdul (A friend of the accused).

PW12 is Encik Isni Faizul Bin Zamri (NSH and GYS's colleague).

PW13 is Encik Mohd Nordin Bin Abdullah (A friend of the accused).

PW14 is Dr. Mohd Alfian Anas Bin Mohd Hashim (The medical doctor at HUKM who attended to NSH upon her admission).

PW15 is Dr Khairul Anuar Bin Zainon (The Forensic Pathologist Specialist who conducted the post-mortem examination on GYS).

PW16 is Encik Abdul Wahid Bin Muhammad Akim (A friend of PW13).

PW17 is Encik Mohamad Zukarnain bin Shariff (A friend of the accused).

PW18 is Encik Sharif Bin Mat Hanapiah (A friend of the accused).

PW19 is Puan Hasnah Binti Awang Kechil (The operator of the CCTV system at Apartment Desa Tun Razak).

PW20 is ASP Fauziah Binti Che Mat (The audio video analyst who captured 35 still images of the accused from the CCTV recording at the Apartment Desa Tun Razak and who prepared his report of the images and the CCTV recording (P11)).

PW21 is Mr. Ganesh a/l A. Palanimalai (The Manager of the Giant Supermarket).

PW22 is ASP Somu a/l Subramaniam (the second I.O. of the case).

PW23 is Dr. Saiful Nizam Bin Shuib (The medical officer at HUKM who attended to GYS upon his admission).

PW24 is Insp. 16965 Ameyrudin Bin Ahmad Zuki (The police forensic audio analyst who made a copy of the CCTV recording at the Apartment Desa Tun Razak in the form of a CD).

PW25 is Puan Mazura Binti Ibrahim (The operator of the CCTV system at the Giant Supermarket).

PW26 is Puan Siti Safinaz Binti Othman (The cashier at the Giant Supermarket). A

PW27 is Encik Mohamad Hazlin Bin Hamzah (The chief cashier at the Giant Supermarket).

PW28 is Sgt. 71361 Mohd Fauzi Bin Yaacob (The Keeper of the Exhibits Store at the Cheras Police District Headquarters). B

PW29 is Dr. Mohd Sukri Bin Hassan (The Government Chemist who analyzed the samples of blood and stomach contents of NSH and GYS).

C

PW30 is Encik Shaari Bin Desa (The Government Chemist who analyzed the contents of 9 envelopes handed over to him by PW22, which contained the exhibits recovered from the crime scene by PW33, which he found to contain black powder usually found in firecrackers).

D

PW31 is Insp. Somchard a/p Den Sed. I/17163 (The Forensic Ballistic Analyst, attached to the Forensic Division at the Police Headquarters in Bukit Aman, Kuala Lumpur).

PW32 is SUPT Soo Mee Tong (The Head of the Forensic Division at the Police Headquarters in Bukit Aman, Kuala Lumpur). E

PW33 is Insp. I/17224 Mohd Aizam Bin Mohamad (The Investigating Officer who packed the various items found by PW31 at the scene of the incident in accordance with the directions of PW32). F

PW34 is C/Insp. I/14329 Norazmi Bin Awang (One of the 3 police officers who participated in the raid on PW16's house and who also took part in the arrest of the accused on 24 September 2010). G

PW35 is Insp. I/17375 Hishamuddin Bin Mohamad (One of the 3 police officers who participated in the raid on PW16's house and who also took part in the arrest of the accused on 24 September 2010).

H

PW36 is C/Insp. Hare Krishnan a/l K. Subramaniam (The Arresting officer who led a team to arrest the accused).

PW37 is DSP G/8804 Zainal Abidin bin Atan (The Bomb expert).

PW38 is Insp. I/16993 Lew Keng Joe (The initial Investigating Officer of this case). I

PW39 is Konstabel 171944, McGrady bin Sylvester (The police officer in the police booth at HKL).

PW40 is Insp. I/19327, Mohd Faznur bin Mohd Fauzi (The police officer who conducted the 2 identification parades in which PW9 and PW12 identified the accused as the person who was seen carrying the bag in the CCTV recording at the Apartment Desa Tun Razak).

The 33 Witnesses Offered To The Defence At The Close Of The Prosecution Case

[31] At the close of the prosecution case the prosecution offered 33 witnesses to the defence.

[32] They are as follows:

(1) SUPT G/9463 Sahadan bin Jaafar (who is the superior officer of PW35 and PW36 and who had led the arresting team to arrest the accused on 24 September 2010 in PW16's house);

(2) DSjn. 118104 Rahman bin Ibrahim;

(3) DSjn. 124039 Jeffry bin Jaafar;

(4) RF100382;

(5) RF116582;

(6) DKpl 115901 Bahari bin Baharom;

(7) DKpl 120049 Amran Abu Hassan;

(8) DKpl 131952 Azlan bin Mat Isa;

(9) DKpl 142081 Azlan bin Mat Yusof;

(10) LKpl 143792 Faizal Rahimi bin Mohd Nordin;

(11) DKpl 122124 Mat Zain bin Othman;

(12) DKpl 137996 Rizalman bin Mat;

(13) DKpl 142154 Rizan bin Othman;

(14) Kpl. 142315 Jabbis Adrian;

(15) DKpl 132728 Hazwadi Zamri bin Shaari;

(16) Kpl. 122839 Mohd. Nahar bin Abd. Rahman;

(17) RF124932;

(18) Kpl. 119457 Nizam bin Yahya;

(19) DKpl 116273 Sri Hari Ramachandran (who together with Nos 2 until 18 are the members of the arresting team, apart from PW34, PW35 and PW36, which arrested the accused on 24 September 2010);

(20) (Anggota D6 IPK Kuala Lumpur) RF123042;

(21) (Anggota D6 IPK Kuala Lumpur) RF98465;

(22) (Anggota D6 IPK Kuala Lumpur) RF116629;

(23) (Anggota D6 IPK Kuala Lumpur) RF135954 (who together with Nos: 20 to 22 and PW34 and PW35 had gone to 3 places and seized items belonging to the acccused, ie PW16's house where the accused was arrested, the Sungai Buloh Hospital where the accused's car and some items in his car were seized and the accused's house in Bandar Tun Razak where some items were also seized);

(24) Insp. I/16888 Suzana bte Zainal Abidin (who had examined the accused's laptop and hand phone);

(25) Puan Murni bt Md Aris (who is the accused's wife);

(26) Encik Suhailee bin Abdullah (who is PW13's brother);

(27) Encik Ahmad Badeli bin Mohd Yusof (who was arrested, on 24 September 2010, together with the accused and PW16 in a house occupied by PW16 but rented by Encik Suhailee bin Abdullah;

(28) Puan Marina bte Ibrahim (who is the Supervisor at the Giant Supermarket);

(29) Mr. Tan Ah Yap (The owner of a hardware shop);

(30) Mr. Lui Chee Seong (The distributor who sold the CCTV system to Mr. Chin Tiam Pin);

(31) Mr. Chin Tiam Pin (The distributor who sold the CCTV system to the Management of the Apartment Desa Tun Razak;

(32) Encik Abdul Aziz bin Omar (who is a friend of the accused); and

(33) L/Corp Mohd Khairi (who handed over the video cassette containing the second CCTV recording to PW22 on the afternoon the prosecution closed its case).

A **The Narrative Of The Prosecution Case**

[33] The narrative of the prosecution case based on the sworn oral testimonies of the material witnesses and the documentary and physical evidence is as follows:

B **The Expression By The Accused To PW11 Of His Desire To Bomb PW9 And NSH**

[34] According to Encik Abdul Rahman bin Abdul (PW11), one of the accused's friends, the accused had twice mentioned to him C that he wished to bomb the towkay of the internet café, ie, PW9, and Ah Soh, ie, NSH.

[35] On two occasions prior to the time of the incident, PW11 had accompanied the accused to the internet café. On these two D occasions, PW11 had stayed at the internet café until late into the night.

[36] The first time was about a month before the date of the incident when PW11 went to the accused's house to borrow a drill from the accused. The second time was about one week prior E to the date of the incident when he was having a drink at a coffee shop with the accused. However, on both these two occasions, PW11 did not take what the accused said seriously. He thought that the accused was merely joking because he noticed that the accused was laughing when he made the statements F about wishing to bomb the towkay of the internet café and Ah Soh.

[37] According to PW11, PW9 and Ah Soh were known to him because he had met PW9 and Ah Soh at the internet café on the G two occasions he had accompanied the accused there. While he was there during the two occasions, he also saw Ah Soh giving money to the accused but he did not know what the money was for. He also heard Ah Soh calling the accused "Adik" in Malay which means "Younger brother" in English. He could see that the H relationship between the accused and Ah Soh was very close.

[38] Subsequently, he saw pictures of Ah Soh in a Chinese language newspaper. The newspaper reported that Ah Soh had passed away because of an explosion caused by a bomb at the I Apartment Desa Tun Razak.

The Expression By The Accused To PW17 Of His Desire To Set Fire To NSH And The Internet Café And The Subsequent Normal Conduct Of The Accused On The Night Of The Eve Of The Incident While He Was Gambling In The Internet Café

[39] According to Encik Mohamad Zukarnain bin Shariff (PW17), another former employee of the accused, he has been to the internet café prior to the date of the incident. He is close to the accused as he had worked as a technician for the accused from 1998 to 2004.

[40] PW9 and NSH are known to him. He had a very special relationship with NSH because he would attend to the wiring problems at the internet café for which he would be paid by NSH. Hence, he used to call NSH "Emak" in Malay which means "Mother" in English.

[41] PW17 could see that the accused had a good relationship with PW9 and that the accused also had a very good relationship with NSH. This is because the accused used to call her "Kakak" and she used to call him "Adik". PW17 also knew the workers at the internet café.

[42] At times, PW17 would also go to the internet café to gamble. He had met the accused at the internet café during his visits there.

[43] About two or three months prior to the incident, after the accused had suffered substantial losses in his gambling activities at the internet café, he twice told PW17 that he wished to set fire to the internet café. This occurred while the two of them were in Abang Zul's coffee shop in Bandar Tun Razak, about 5 kilometres from the internet café.

[44] However, on the first occasion, which was three months before the date of the incident, PW17 did not take the accused's statement seriously. PW17 thought that the accused was merely joking about the matter out of his frustration over his gaming losses. Nevertheless, PW17 was afraid that the accused would carry out his threat. PW17 felt this way because PW17 could see from the expression on the accused's face that the accused was angry. So PW17 advised the accused not to do it and to think of his wife and children.

[45] On the second occasion, which was about one month before the date of the incident, the accused told PW17 the same thing while they were in Abang Zul's coffee shop. This time the accused's actual words were "Ah Soh ni, aku bakar. Jugalah kedai dia" in Malay which means "This Ah Soh I will burn. As well as her shop" in English. PW17 understood "Ah Soh" to mean NSH. PW17 saw from the expression on the accused's face that the accused appeared to be out of his mind. PW17 advised the accused "Tak payahlah buat benda-benda macam itu" in Malay which means "No need to do such things" in English.

[46] PW17 was under the impression that the accused had made the statements to him (PW17) because the accused had suffered losses many times at the internet café during his gambling sessions. PW17 did not know exactly how much money the accused had lost through his gambling activities at the internet café. PW17 guessed that the amount could have been as much as about RM20,000 to RM30,000. PW17 himself had lost a total of about RM6,000.

[47] On 28 August 2010, at about 11pm, which was the night before the incident, PW17 was in the internet café together with the accused. The accused was gambling online on the internet. At 2am, the next morning, after the accused had lost about RM2,000 to RM3,000, PW17 saw the accused leaving the internet café. However, in spite of having lost that amount of money, PW17 saw that the accused appeared to be his normal self.

[48] PW17 himself stayed on in the internet café until 6.30am in the morning.

[49] He, subsequently, came to know of the explosion.

The Purchase Of "Mercun Bola" By PW18 Upon The Accused's Request And The Subsequent Handing Over Of The "Mercun Bola" To The Accused

[50] According to Encik Sharif bin Mat Hanapiah (PW18), a former employee of the accused, who had ceased working with the accused in 2005, the last time he met up with the accused was at the end of July 2010; ie, about a month prior to the incident.

[51] On that occasion, he had handed over to the accused, two packets of a type of fire crackers called "mercun bola" in Malay which means "ball firecrackers" in English at a fish pond in a farm

in Penang at 9pm. He had done that in compliance with the accused's request made personally to him by the accused about one week earlier through a telephone call. PW11 had purchased them at a cost of RM40 from one of his friends, namely, Mohd Zamry.

[52] When he was shown five photographs of "mercun bola", P4 (41), (43), (50), (51) and (54), which were taken at the scene of the incident, he said the colour of the "mercun bola" which he had handed over to the accused was similar to the colour of the "mercun bola" as shown in the five photographs. However, he was unsure as to whether the size of the two packets of "mercun bola" which he had handed over to the accused was the same as those shown in the five photographs. According to him, there are three sizes of "mercun bola", ie, small, medium and big. He had bought the medium sized "mercun bola" for the accused. The ones in the five photographs which were showed to him in court looked a size bigger.

The Accused Warned NSH On The Eve Of The Incident

[53] According to PW9, on the day before the incident, the accused's father passed away. NSH said to PW9 that they must give cash and four hampers to the accused. After they had done that, the accused approached PW9 to shake PW9's hand and to thank PW9. He also said to PW9 that it is good that PW9 and "Aunty", ie, NSH, have a lot of money.

[54] On the night before the incident, NSH confided in PW9 that the accused had approached her at 8pm and requested for a loan of RM20,000 and she had told him that she did not have money. She also confided in PW9 that the accused had then said to her "Kalau tak beri pinjam besok kamu tengoklah" in Malay which means "If you do not give the loan, tomorrow you will see" in English.

[55] However, PW9 told NSH that the accused is a very good person, implying that the accused would not do anything to harm her. Nevertheless, NSH told him that the accused had already given her a warning and she repeated the accused's warning in the accused's words "Besok kamu tengoklah!" in Malay which means "Tomorrow you will see!".

The Normal Conduct Of The Accused Later In The Night On The Eve Of The Incident While He Was Gambling In The Internet Café

[56] According to PW12, the accused is known to him as the accused is a regular patron of the internet café.

[57] On 28 August 2010, at 10.30pm, PW12 reported for work as usual at the internet section of the internet café. PW12 was informed by NSH that the accused wished to be given a credit amount of RM5,000 to enable him to play slot games. After NSH had given her approval, PW12 credited a sum of RM5,000 into the account of the personal computer which the accused was using to play slot games. The accused then used the credit to play the slot games.

[58] The usual practice is that each time the accused wishes to gamble online he has to inform PW12 and to make payment to PW12 first before PW12 would allow him to have access to the gaming site.

[59] At times when the accused ran out of money, he would ask PW12 for permission to continue gambling on credit. PW12 would then have to obtain the permission of NSH to allow the accused to gamble on credit. By virtue of the close relationship between the accused and NSH, the latter would usually allow the accused to gamble on credit.

[60] At about 2am, on the morning of the following day, ie, 29 August 2010, PW12 saw the accused leaving the internet café after the accused had used up the credit of RM5,000.

The Act Of The Accused In Carrying A Blue Coloured Bag And Walking Towards The Lifts Of Block 2 At 3am On The Date Of The Incident

[61] At 3am, which was about one hour after the accused had left the internet café, and as PW12 was about to close the internet café, he sighted the accused at the far end of the building, about 20 metres away from him. The accused was carrying a bag and walking towards the direction of the lifts section of the building. With the lighting from the street light and the building lights PW12 was able to see that the bag was blue in colour, about two feet in width, with two strings and shaped like a box. However, from where he was standing PW12 could not see the contents of the bag.

The Fire And Explosion Which Caused The Fatal Injuries To NSH And GYS Upon GYS Lifting Up The Two Pomelos From The Bag

[62] According to PW9, on the morning of the incident, he was woken up from his sleep by NSH whom he calls "Aunty". NSH informed him that there was a box with pomelos outside their apartment.

[63] NSH asked PW9 whether he had purchased the pomelos. PW9 replied that he did not. NSH then said that perhaps Ah Ti had bought the pomelos.

[64] Both of them then went outside to have a look. PW9 saw a blue coloured plastic bag with a box inside and on top of the box were two pomelos. PW9 could sniff the smell of petrol emanating from the box.

[65] He then saw NSH opening the box slightly and NSH said she could also sniff a smell like the smell of petrol.

[66] Both of them then went downstairs to the internet café where they met Ah Ti and NSH ate some food.

[67] The court noted that PW9's evidence on this fact-in-issue is corroborated by the evidence of PW12 who was on duty at the internet café at that time. PW12 saw NSH who is known to PW12 as "Aunty" in the internet café together with PW9 and they were looking for Ah Ti. Later, PW12 saw PW9 and NSH speaking with Ah Ti for about five minutes but he could not hear what was being spoken.

[68] According to PW9, NSH asked Ah Ti whether he had ordered the pomelos. Ah Ti replied that they could ask the opposite neighbour whether he had bought the pomelos. If the opposite neighbour did not, then they could just take them and eat them.

[69] PW12 then saw all three of them going upstairs.

[70] After the three of them had gone upstairs to the 12th floor, to the front of the apartment, PW9 saw that the bag was still there. PW9 saw Ah Ti lifting up one of the pomelos. As Ah Ti was doing that, suddenly, PW9 saw petrol on the faces of Aunty and Ah Ti and both of them were on fire. PW9 also heard a loud explosion. He also heard both of them screaming "Tolong!" "Tolong!" in Malay which means "Help!" "Help!" in English.

[71] He saw many people rushing towards Aunty and Ah Ti.

[72] The court noted that the testimony of PW9 concerning the explosion is corroborated by PW12's testimony, one of the two police reports which were lodged, and the testimonies of the other prosecution witnesses.

[73] According to PW12, while he was in the internet café he heard a very loud sound of an explosion. Thinking that it was caused by a leaking pipe which had burst PW12 went out of the internet café to ascertain the cause but he did not see anything.

[74] He then went outside of the building, to the central corridor of the building. He saw pieces of broken glass on the ground. He then went upstairs, from floor to floor, using the staircase. Upon reaching the 12th floor, he saw the burnt NSH in front of the lift. He also saw that there were many people giving assistance to her.

[75] PW12 then went downstairs to the internet café. He then closed and locked up the internet café.

[76] The court found PW12 to be a truthful witness and his evidence credible. The court found that his evidence corroborated PW9's evidence concerning the explosion and the injuries suffered by NSH.

[77] PW9 called the police, the fire department and an ambulance to take GYS and NSH to the hospital for treatment.

[78] The police came to the scene of the incident. An ambulance also came to the scene of the incident. It took Aunty (NSH) and Ah Ti (GYS) to the Universiti Kebangsaan Malaysia Hospital ("HUKM"). PW9 did not follow them to the HUKM. PW9 went to a nearby clinic to obtain treatment for some slight injury to his hands caused by the fire and the explosion.

[79] At 1pm, he went to HUKM to see Aunty and Ah Ti (NSH and GYS).

[80] At 5.19pm, PW9 lodged a police report, ie, Sungai Besi Report No. 9555/10 (P12) at the Sungai Besi police station concerning the fire and explosion which had happened in front of his apartment upon Ah Ti lifting up the two pomelos from the box inside the bag.

[81] The court noted that his report corroborated his sworn oral testimony. The court also noted that what he had told PW38 the first IO who arrived at the crime scene, soon after the incident, ie, at 9.15am, was consistent with his sworn oral testimony. The court, therefore, found PW9 to be a truthful witness and accepted his evidence as it was consistent and credible.

The Treatment Given To NSH For Her Injuries Caused By The Fire And Explosion Upon His Admission To HUKM Could Not Save Her Life

[82] Upon her admission into HUKM, NSH was immediately attended to, at about 9.20am, for an alleged blast injury by Dr Mohd Alfian Anas bin Mohd Hashim (PW14), a medical officer.

[83] PW14 found her to be alert, conscious and talking even though she had burn injuries covering almost all her body. He found that more than 90% of her bodily surfaces were affected by the alleged blast injury.

[84] After he had resuscitated her, given her medication, ordered blood tests to be carried out, he referred her to the Plastic and Physiology units and the surgery team for their management.

[85] PW14 also lodged a police report. He identified P15 as his police report, ie, Sungai Besi Report No. 009550/10.

[86] The court noted that except for the error in the date of NSH's admission into HUKM, which was erroneously stated as 28 August 2010 instead of 29 August 2010, in the police report, the rest of the contents of PW14's police report corroborated his sworn oral testimony.

[87] The court accepted his evidence. The court found his evidence credible and it corroborated PW9's evidence as to the occurrence of the fire and explosion and the injuries suffered by NSH as a result thereof.

The Identification Of NSH By Her Son (PW18), The Post-Mortem Examination Of NSH By PW10 And The Cause Of NSH's Death

[88] According to NSH's son, Encik Hakimi Kng Yong Som (PW8), after he was informed of the incident on 29 August 2010, he visited his mother (NSH) at the HUKM at 11.30am. Upon his

A arrival at the HUKM, he saw two persons who were wrapped in bandages. At first he could not recognise his mother because her face was white in colour as her facial skin had been completely burnt away by the fire.

B **[89]** Nevertheless, he was able to identify his mother through her voice. He heard her shouting out "Sakit! Sakit!" in Malay which means "Painful! Painful!" in English. This was because she was in extreme pain at that time.

C **[90]** NSH passed away the following day, ie, on 30 August 2010 whilst Ah Ti passed away a day after that, ie, on 31 August 2010.

[91] PW8 also said that his late mother was working as a manager at the internet café at the material time.

D

[92] PW8 was also able to identify PW9, as his late mother's employer. According to PW8, prior to the incident, his late mother had told him that the accused owed her RM30,000 or RM40,000. The body of NSH in the photograph (P5 (2)), which was taken E by the police photographer, before PW10 conducted the post-mortem examination on NSH on 30 August 2010, was also identified by PW8.

[93] The court found PW8 to be a truthful witness and his F evidence credible. Based on his testimony and the testimony of PW10 as corroborated by PW10's report and the photographs, the identity of NSH as stated in the first count was duly proved by the prosecution.

[94] According to Dr Faridah binti Mohd Nor, the forensic G pathologist attached to HUKM (PW10), NSH suffered burns to 99% of her body and head and the cause of her death is severe burns from an explosion. She was of the opinion that NSH's chances of surviving the serious injuries suffered by her were extremely slim and that death was a natural consequence of the H severe burns suffered by NSH.

[95] Her sworn oral testimony is corroborated by the contents of her report (P14) which she identified. She also identified P5 (1-14) as the 14 photographs which were taken of NSH by the I police photographer before, during and after the post-mortem examination conducted by her on 30 August 2010, at 11.30am.

[96] Based on her qualifications and experience, the court was of the view that she was competent to undertake the post-mortem examination of NSH. The court accepted her findings. From her evidence and the evidence of PW14, the court was able to make an irresistible inference that the person who had placed the bag containing the pomelo bomb outside and in front of the apartment had intended to kill or to cause the death of the occupants of the apartment which are PW9 and NSH because the manner in which the death of NSH was caused was so imminently dangerous that death would surely ensue.

The Treatment Given To GYS For His Injuries Caused By The Fire And Explosion Upon His Admission To HUKM Could Not Save His Life

[97] According to Dr Saiful Nizam bin Shuib (PW23), the medical officer who was attached to the Medical Centre at HUKM in August 2010, on 29 August 2010, he was on duty from 8am to 3pm, at the Critical Zone of the Medical Centre at HUKM.

[98] On that morning, he received a big sized fair skinned male patient, aged in his 30s, by the name of GYS. He could hear GYS saying "Ada bom! Ada bom!" in Malay which means "There is a bomb! There is a bomb!" in English. The court admitted this evidence as it constituted GYS's dying declaration because GYS passed away soon after making these statements. These statements also corroborate PW9's evidence as to the manner in which the incident had occurred.

[99] He saw that the male patient had severe injuries over the whole of his body, in particular, on his face.

[100] He administered emergency treatment to GYS. He also prescribed medication and water for the patient before he referred GYS to the Surgical Division.

[101] He then lodged a police report.

[102] He identified P29 as his police report, ie, Sungai Besi Report No. 9549/10 dated 29 August 2010.

[103] PW23 was able to identify the person shown in the two photographs (P7 (3) and (4)), as GYS.

[104] PW23 said that GYS was brought to the Medical Centre by ambulance. PW23 also explained that the Critical Zone is for patients who are in critical condition as they may lose their lives at any time.

[105] The court noted that PW23's sworn oral testimony was corroborated by the contents of his police report (P29). The court accepted PW23's evidence as it was credible and it was also consistent with the evidence of PW9, PW7 and PW15.

The Identification Of GYS By His Father (PW7) Before The Post-Mortem Examination Of GYS By PW15 And The Cause Of GYS's Death

[106] The body of GYS was identified by his father, Goh Sang Huat (PW7), and ASP Somu, the second IO (PW22) to Dr Khairul Anuar bin Zainon (PW15) the forensic pathologist specialist attached to HUKM, before PW15 conducted the post-mortem examination on GYS on 31 August 2010, at 3.30pm. He identified his son based on a tattoo at the back of GYS which was confirmed by PW15.

[107] Based on his evidence as corroborated by PW15's testimony, PW15's report and the photographs, the court found that the identity of GYS as stated in the second count was duly proved by the prosecution.

[108] PW15 holds a degree in MBBS from the University of Otago, New Zealand and a Masters degree in Forensic Pathology from Universiti Kebangsaan Malaysia (UKM). He was first attached to the Ipoh Hospital as a graduate medical officer in 2000. In 2001, he was attached to the same hospital as a medical officer. In 2003, he was attached to the same hospital as a forensic medical officer.

[109] In the year 2010, he was attached as the forensic pathologist specialist attached to HUKM. In that capacity he has performed many post-mortem examinations in forensic cases at the Kuala Lumpur Hospital and also in hospitals throughout Malaysia. Apart from that, he attends courses on post-mortem examinations in HUKM and overseas, writes and publishes articles concerning forensic medicine and delivers lectures to undergraduate and postgraduate medical students and medical doctors.

[110] Right until the date when he testified in court he had conducted a substantial number of post-mortem examinations, ie, about 1,000.

[111] According to PW15, GYS was initially admitted to the HUKM but subsequently taken to the Kuala Lumpur Hospital for further treatment.

[112] On 31 August 2010, at 5.45am, PW15 was informed that GYS had passed away at the Kuala Lumpur Hospital. On that day, at 3.30pm, upon the request of the second IO (PW22), he conducted a post-mortem examination on GYS. PW15's sworn oral testimony is corroborated by his report (P16).

[113] He found that the body was that of a big sized adult male Chinese who was not suffering from any disease. He saw that there was a tattoo on the back of the body and that the whole of the body was wrapped in cotton wool. He found that the body and the head suffered 90% severe third degree burns.

[114] In his opinion, the deceased had died because of the severe bodily burns suffered by the deceased which were caused by dry heat. In his opinion, a person would normally die if the person were to suffer 40% severe third degree burns. In the instant case, the deceased suffered more than twice that percentage of severe third degree burns. Hence, the chances of the deceased recovering from the severe burn injuries suffered in the explosion were extremely slim or practically nil.

[115] PW15 identified P7 (1-11) as the 11 photographs which were taken of GYS before, during and after the post-mortem examination conducted by him on GYS.

[116] Based on PW15's qualifications and experience the court was of the view that he was competent to carry out the post-mortem examination on GYS. The court accepted his findings. Based on his opinion and findings which was corroborated by PW9's, PW23's and PW8's evidence, the court was able to draw an irresistible inference that the person who had placed the bag containing the pomelo bomb outside and in front of the apartment had intended to kill or to cause the death of the occupants of the apartment which are PW9 and NSH and anyone who lifted up

A the pomelos including GYS because the manner in which the death of GYS was caused was so imminently dangerous that death would surely ensue.

No Possibility That The Deaths Of NSH And GYS Were
B **Caused By The Ingestion Of Drugs And/Or Alcohol Or Carbon Monoxide Poisoning**

[117] According to Dr Mohd Sukri bin Hassan (PW29), the Head of the Clinical, Toxicology and Alcohol Unit of the Department of Chemistry, Malaysia, Petaling Jaya, on 2 September
C 2010, at 3.40pm he received five envelopes, marked 'SN1' to 'SN3' and 'SG1' and 'SG2', respectively, which were handed over to him by the second IO (PW22).

[118] After he had analysed the specimens in the five envelopes,
D he found that the blood specimen of GYS in the envelope marked 'SG1' and the stomach content specimen of GYS in the envelope marked 'SG2' did not contain any ethyl alcohol, drugs or carbon monoxide gas.

E **[119]** He found that the blood specimens of NSH in the two envelopes marked 'SN1' and 'SN2', respectively and the stomach content specimen of NSH in the envelope marked 'SN2' also did not contain any alcohol, drugs or carbon monoxide gas.

F **[120]** The court noted that his sworn oral testimony is corroborated by the two official receipts (P89 and P90), which bore his signature, which he had issued to the IO (PW22), and the contents of his chemist report bearing the laboratory number PJ(FOR) 10729/10-1 dated 1 November 2010 (P91).

G **[121]** PW29 identified P89 and P90 as the two receipts issued by him and P91 as his chemist report.

[122] Based on his evidence which the court found credible and the evidence of PW10 and PW15, the court was satisfied that the
H deaths of the two deceased persons were caused by the accused. The court was also able to rule out the possibility that the deaths of the two deceased persons could have been caused by the ingestion of drugs or alcohol or by carbon monoxide poisoning.

I

After The Explosion, On 29 August 2010, At About 8.30am, The Accused Fled To PW13's House On 30 August 2010, At 7.30am And Later, While The Accused Was Staying With PW16 And Upon Being Confronted By PW13, The Accused Confessed To PW13 That He (The Accused) Had Placed The Pomelo Bomb In Front Of The Apartment Because He Was Angry As He Had Gambled And Lost

[123] According to Encik Mohd Nordin bin Abdullah (PW13), a childhood friend of the accused, on 30 August 2010, at 7.30am, as he was about to leave his house to send his child to school he saw the accused in front of his house. He saw that the accused had driven to his house in a green coloured Proton Saga.

[124] He approached the accused and the accused informed him that he wished to stay in his office because the accused had a family problem. As there was no water supply to his office, PW11 suggested to the accused to stay with Wahid (PW16), his brother's worker, in the bachelors' quarters in Sungai Buloh. The name of his brother is Suhailee bin Abdullah ("Suhailee") (who was among the 33 witnesses offered to the defence at the close of the prosecution case).

[125] The accused agreed. PW13 then met up with the accused at the Sungai Buloh hospital where the accused left his car at the car park area. The accused then got into PW13's car. They then proceeded to Suhailee's factory in Sungai Buloh. They arrived there at 9.30am. Suhailee allowed the accused to stay with Wahid in Wahid's house. PW13 obtained the key to Wahid's house from Suhailee. PW13 then took the accused to Wahid's house in Kampung Paya Jaras.

[126] While they were in the car on their way to Wahid's house, the accused informed PW13 that he was chased out of his house by his wife because of his affair with a woman.

[127] About three or four days later, ie, on 3 September 2010, Suhailee phoned PW13 and informed him that he had read in the newspapers that the police were looking for the accused in connection with the explosion involving the pomelo bomb.

[128] PW13 got a shock upon being told the news.

[129] About one or two days after having been informed by Suhailee, PW13 went to see the accused in Wahid's house.

[130] When he arrived at Wahid's house at 8pm, he saw the accused and Wahid sitting in the living hall. Badeli was in one of the two bedrooms. PW13 then watched TV together with Wahid and the accused in the hall. He also chit chatted with both of them. He then asked the accused to go inside the other bedroom which was empty.

[131] After the accused had entered the empty bedroom, PW13 confronted the accused and asked the accused whether it was true that he was involved in the bombing case.

[132] Initially the accused replied that since he was often in the internet café he was suspected (of being involved). The accused then said "Kalau aku buat aku tanggungjawablah" in Malay which means "If I have done it I will be responsible for it."

[133] This was followed by the accused saying that he (the accused) had done it.

[134] PW13 observed that the accused appeared his normal self when he was telling PW13 of his involvement in the incident.

[135] PW13 then said to him "Kalau you buat you surrender" in a mixture of Malay and English which means "If you have done it you surrender" in English.

[136] The accused asked PW13 to give him time (to surrender) because he wished to meet his client to make a claim for payment and to collect the payment. The accused said "Hari nak Raya" in Malay which means "It will be the (Malay) New Year" in English and the accused said he needed money for his family. The accused also said that he will surrender after that. The accused further said that he was responsible for the incident.

[137] The accused also said as follows:

(1) On the night before the incident, Ah Soh of the internet café had called him and asked him to go to the internet café;

(2) He had complied with her request and he had gone to the internet café and he had gambled;

(3) As a result of his gambling at the internet café he had lost about RM20,000 to RM30,000;

(4) So later in the early morning (of the next day), at about 3am, he took the bag with the pomelo bomb inside and he placed it in front of the house, ie, apartment;

(5) He then went home;

(6) At 10am, the following morning, he had a change of heart;

(7) So he went back to the place where he had earlier left the pomelo bomb with the intention of taking it back but he saw many people there;

(8) He also saw the police and the firemen there;

(9) So he left the place;

(10) When he initially placed the pomelo bomb there he was mentally unstable;

(11) There were firecrackers inside the bag;

(12) "Kenapa bodoh saya buat perkara itu?" in Malay which means "Why was I so stupid to have done that sort of thing?" in English;

(13) There was a box inside the bag and he had placed firecrackers and petrol inside the box;

(14) He had placed the bag there because he was angry as he had gambled and lost; and

(15) He wished to collect a sum of RM18,000 to be given to his wife and to pay his workers.

[138] According to PW13, the accused did not say that he wished to collect the money in order to engage a lawyer.

[139] As he was speaking and telling PW13 the above matters, PW13 observed that the accused would be laughing at times and at other times the accused would be serious.

The Accused's Confession To PW16 That He Had Made The Bomb Which Caused The Explosion

[140] According to Encik Wahid bin Muhammad Akim (PW16), he was born in Malaysia on 4 September 1990, to parents who are Indonesian nationals and who are permanent residents of Malaysia. At the age of six years old, he went to Indonesia. He

A lived there until he was 14 years old. In 2004, while he was aged 14 years he returned to Malaysia and he was given an identity card (blue in colour) as a Malaysian citizen.

[141] He was employed by Suhailee from 2006 to 2009. He
B knows Suhailee's wife and also Nordin (PW13).

[142] In the month of August 2010, he was no longer working in Suhailee's furniture factory. Nevertheless, he was still staying in the house rented by Suhailee and Suhailee had a key to the
C house. He was working as an ordinary labourer servicing air-conditioners for his employer by the name of Boy.

[143] On the morning of 30 August 2010, PW13 called him and informed him that Eddy needed to stay in his house temporarily because Eddy was chased out of his house by his wife. Upon
D Suhailee's and PW13's requests, PW16 agreed to allow Eddy to stay temporarily in his house.

[144] PW16 identified the accused in the dock as Eddy.

E **[145]** However, before the accused went to stay with him in his house, PW16 had already read about the incident in the Kosmo magazine while he was passing time in a coffee shop. He had read the heading of the news item concerning the incident, ie, "Kes letupan, satu orang mati dan satu orang lagi cedera akibat terkena
F mercun buatan sendiri" in Malay which means "The case of the explosion, one dead and one more seriously injured because of homemade firecrackers."

[146] On 30 August 2010, at 7pm, when he returned home he saw that the accused was already in his house. PW16 also saw
G that the accused had a laptop computer with him.

[147] On the following day, PW16 saw that the accused had brought along with him a bag of clothes.

H **[148]** On one occasion during the accused's stay in his house, suddenly out of the blue, the accused asked PW16 whether PW16 was capable of betraying a friend if PW16 was paid RM10,000. PW16 replied that he would not do that.

[149] The accused then confided in PW16 the (real) reason why
I he had requested to be allowed to stay in PW16's house. The accused said he had a big problem.

[150] PW16 testified as follows in Malay at pp. 136 and 138 of the notes of evidence:

S: Ada berbual dengan dia?

J: Ada.

S: Ada diberitahu tentang kenapa sebenarnya dia minta tumpang untuk tinggal di rumah kamu?

J: Ada.

S: Sila beritahu Mahkamah, bila itu berlaku dan apa yang dia beritahu kamu?

J: Bila saya tidak ingat. Dia ada beritahu yang dia ada masalah besar. Dia ada cakap dengan saya, kalau ada orang bagi RM10,000 kat you, you sanggup khianati kawan? Saya cakap, 'Tak kot'. Dia cakap 'Kamu ada dengar kejadian kes letupan baru-baru ini?'. Dia tanya saya. Selepas itu 'Ya, saya ada nampak di majalah Kosmo'. Selepas itu dia cakap 'Itu semua kerja saya'. Selepas itu saya ada tanya 'Ya ke? Kenapa you buat?'. Dia jawab 'Saya hendak tolong orang Melayu sahaja sebab dia banyak mentadarah orang Melayu', kira macam ambil duit orang Melayu, sebab main game kat dia'. Saya cakap 'Ya ke?'. Selepas itu saya cakap 'Tapi saya nampak ada orang terkena, saya nampak dalam Kosmo lah'.

S: Apa maksud kamu dengan terkena?

J: Maksud saya dengan terkena ialah ada orang yang menjadi mangsa.

S: Apa jawapan dia?

J: Jawapan dia, 'Ya, itu kawan baik saya'.

S: Ada apa-apa perbualan lanjut? Ada kamu tanya apa-apa lagi?

J: Ada. Saya tanya 'Macam mana you buat itu letupan?'. Dia cakap 'Simple je. Macam menggunakan mercun, PVC, petrol dan mancis'.

S: Ada kamu tanya lebih lanjut macam mana?

J: Selepas itu, saya tergamam. Selepas itu, saya tidak ingat. Saya rasa tidak ada perbualan lagi selepas itu.

S: En. Wahid, sepanjang dia tinggal di situ sejak 30.8.2010 hingga 24.9.2010, ada kamu perhatikan dia?

J: Ada.

S: Boleh kamu cerita kepada Mahkamah, bagaimana tindak tanduk dia, ataupun keadaan dia berada di rumah kamu?

J: Sedih. Yang saya perhatilah, mungkin masa itu tidak ada apa-apa. Mungkin banyak yang gembira daripada yang sedih. Tetapi ada sedih, gelisah, sembahyang, main laptop, mungkin time itu hari raya, so kemungkinan dia jauh dari anak isteri dia. Saya rasa dia sedih, gelisah.

S: Ada kamu lihat perbuatan yang lebih extra lagi?

J: Tidak ada. Kadang-kadang menitis air mata. Tapi bukan selalu.

S: Dan pada waktu itu, sepanjang masa itu, dia tidur di mana?

J: Tidak tentu. Kadang-kadang di ruang tamu, depan laptop, kadang-kadang di dalam bilik.

S: Bilik siapa?

J: Bilik saya.

S: Pernah kamu lihat dia berada bersama Badli?

J: Kitorang 3 orang sama-sama.

[151] PW16's testimony means as follows in English:

The accused said: "Did you hear about a case concerning an explosion recently?

PW16 replied: "Yes, I have seen it in the Kosmo magazine."

The accused said: "It was done by me."

PW16 then asked: "Is that so?" "Why did you do it?"

The accused replied: "I only wish to help the Malays because he has taken the blood of the Malays".

[152] By saying this PW16 understood the accused to mean "taking the money of the Malays through playing games at his place".

PW16 then said: "Is that so?" and "But I saw that someone was hurt (ie has become the victim). I saw this in the Kosmo."

The accused replied: "Yes, that was my good friend."

PW16 asked: "How did you make the explosion?

The accused said: "It's simple. Like using firecrackers, PVC, petrol and matches." A

[153] Upon hearing the accused's reply, PW16 became speechless.

[154] During the three weeks that the accused was staying with PW16, PW16 noticed that at times, the accused appeared normal, and at times, sad and troubled. B

[155] There were also times when he saw tears rolling down from the accused's eyes. At times, the accused would sleep in the living hall in front of his laptop. At times, the accused would sleep in PW16's room. C

[156] After staying with PW16 for about three weeks the three of them, ie, PW16, the accused and Badeli, (who was among the 33 witnesses offered to the defence at the close of the prosecution case) were arrested by the police on 24 September 2010. D

[157] The arrest came about as follows: E

[158] On that day, at about 6am, while PW16 was in his bedroom, he heard what sounded like an altercation in front of his house. Thinking that there was an altercation outside his house he opened the front door and the police immediately entered his house. Insp Harekrishnan s/o K Subramaniam (PW36) then arrested him, the accused and also Badeli. F

[159] PW16 was shocked upon being arrested by Insp Harekrishnan (PW36).

[160] PW36 did not tell him the reason for his arrest. After his arrest he was produced before a Magistrate and remanded for 14 days. G

[161] While he was under remand by the police, he had given a statement to ASP Somu, the IO (PW22) concerning what was related to him by the accused, ie, how the accused created the big problem involving the explosion. H

[162] Although it was suggested, repeatedly, to PW16 in cross-examination by Dato' Hanif, that the accused did not relate to him the explosion case PW16 disagreed with the suggestions and was steadfast in maintaining that the accused did relate the incident to him. I

[163] The testimony of PW16 at pp. 149 to 152 of the notes of evidence is reproduced below:

S: Adakah kamu ceritakan satu-satu perkataan yang keluar dari mulut Eddy kepada Somu?

J: Tidak semua.

S: Adakah itu benar?

J: Sebab masa dia cakap ... Benar.

S: Saya katakan kepada kamu, tidak banyak yang diperkatakan kepada kamu tentang peristiwa yang kamu baca, yang kamu tengok di dalam akhbar Kosmo oleh En. Eddy kepada kamu, kamu setuju atau tidak?

J: Tidak setuju.

S: Oleh kerana En. Eddy jauh beza umur dengan kamu, dia lebih rapat dengan Nordin dan Suhailee, dia takkan cerita apa-apa peristiwa dengan kamu, saya katakan kepada kamu. Eddy tidak cerita apa-apa kepada kamu. Dia cuma rapat dengan Suhailee dengan Nordin sahaja. Setuju atau tidak?

J: Tidak.

S: Kamu beritahu Mahkamah tadi, bahawa kononnya Eddy ada cerita kepada kamu tentang peristiwa yang kamu baca dalam akhbar Kosmo itu, selepas ditanya oleh pihak polis di IPK Kuala Lumpur. Setuju dengan saya?

J: Tidak setuju.

S: Sebenarnya Eddy hanya kata kepada kamu, selepas kamu tanya 'betulkah?'. 'Nama Eddy ada keluar dalam suratkhabar itu, adakah itu kamu?'. Setuju dengan saya?

J: Masa itu tidak ada kena mengena dengan suratkhabar cari dia. Saya tidak ada tanya. Saya cuma balasan jawapan, 'Owh, saya ada terbaca dekat Kosmo'.

S: Saya katakan kepada kamu, Eddy tidak pernah cerita apa-apa pun kepada kamu pasal benda atau berita yang keluar dalam suratkhabar Kosmo?

J: Tidak setuju.

S: Dan apa yang kamu cakap kepada polis, tentang yang berlaku itu saya yang lakukan itu adalah andaian kamu sahaja?

J: Tidak setuju.

S: Sebab, saya katakan begitu, Eddy cakap dalam Bahasa Malaysia, itupun tidak selalu dengan kamu. Jadi dia tidak ada sebab hendak cerita dengan kamu. Adakah kamu setuju?

J: Tidak.

S: Saya juga katakan, apa yang dicakapkan oleh Eddy adalah dalam Bahasa Malaysia dan memberitahu dalam Bahasa Indonesia kepada pihak polis, setuju?

J: Tidak.

S: Saya katakan, kamu sendiri tidak faham apa yang dimaksudkan oleh Eddy dan apa yang kamu ceritakan kepada pihak polis, setuju?

J: Tidak.

S: Eddy hanya cakap dengan kamu, dia tumpang tinggal di rumah kamu, apabila Nordin telefon kamu, sebab dia keluar rumah, kena halau oleh keluarga dia terutama isteri sebab dia main perempuan, main judi?

J: Ya, betul.

S: Tidak ada lain-lain dia sebut, setuju?

J: Tidak ada lain-lain dia sebut.

S: Selebihnya, bolehlah saya katakan, kerana Eddy lebih rapat dengan Nordin, dengan Suhailee, dia lebih banyak cerita dengan mereka berdua, setuju?

J: Setuju.

(emphasis added).

Pemeriksaan Semula.

S: Wahid, sebentar tadi, ketika disoal balas oleh PB yang bijaksana, kamu beritahu Mahkamah, apabila ditanya begini, En. Eddy hanya beritahu kamu, yang dia dihalau rumah sebab main perempuan dan main judi, tidak ada sebab lain, kamu setuju. Sedangkan dalam pemeriksaan utama tadi, kamu ada cerita panjang tentang apa yang dia beritahu kamu tentang kejadian bom, mana satu yang betul, jelaskan.

J: Mula-mula dia ada cerita yang dia kena halau dengan isteri dia. Kes yang bom itu, kemudiannya. Lama selepas itu. Tidak berapa lama.

A S: Jadi, jelaskan, adakah apa yang kamu beritahu dalam pemeriksaan utama tadi, adakah ianya berlaku? Masa saya tanya tadi, kamu jawab kepada Mahkamah, adakah benda yang kamu cerita itu betul berlaku?

J: Betul.

B

S: Kenapa jawab kepada peguam?

J: Sebab saya tak faham.

S: Kamu lahir tahun 1990. Apabila kamu masuk Malaysia pada
C 2004, berapa umur kamu?

J: 14 tahun.

[164] The testimony of PW16 at pp. 153 to 155 of the notes of evidence is reproduced below:

D

S: Tapi dalam percakapan hari-harian kamu sepanjang berada di Negara ini ataupun sepanjang hidup, bahasa apa kamu gunakan?

J: Bahasa Melayu.

E

S: Jadi, ketika Eddy berbual dengan kamu, apa yang kamu beritahu Mahkamah sebentar tadi, adakah kamu faham apa yang diceritakan?

J: Faham.

F

S: Adakah kamu ada tokok tambah tadi, dalam penerangan kamu, apa yang diceritakan pada kamu?

J: Tidak ada.

G

S: Kamu ditahan selama 14 hari. Dalam tempoh tahan tersebut, ada kamu dipaksa ataupun disuruh oleh pihak polis untuk mengada-adakan cerita, sepertimana yang kamu ceritakan tadi?

H

J: Tidak ada.

S: Dan pada waktu kamu ceritakan kepada ASP Somu tentang apa yang berlaku, adakah apa yang berlaku itu segar dalam ingatan kamu?

I

J: Betul.

S: Apa yang kamu beritahu ASP Somu, datang dari mana?

J: Datang daripada Eddy, daripada percakapan dia kepada saya.

S: Masa kamu ceritakan kepada ASP Somu, dari mana datangnya cerita itu? Ketika kamu disoal siasat oleh ASP Somu, semasa percakapan kamu dirakamkan oleh ASP Somu. Kamu ada memberikan percakapan. Dari mana datang cerita kamu? Bagaimana kamu boleh cerita kepada ASP Somu?

J: Sebelum saya kena tangkap itu, saya ingat balik. Datang daripada ingatan saya.

S: Dan pada ketika itu, masa beritahu itu, bagaimana ingatan kamu tentang perkara itu?

J: Kurang jelas.

S: Masa percakapan dirakam, bagaimana ingatan kamu tentang perkara itu?

J: Kurang, masa itu serabut.

S: Macam mana kamu boleh cerita kepada ASP Somu?

J: Saya cerita apa yang saya ingat sahaja.

S: Apa yang kamu cerita itu, adakah perkara itu benar?

J: Benar.

S: Kamu beritahu, kamu serabut?

J: Ya. Tinggal dalam lokap.

S: Adakah oleh kerana serabut itu, menyebabkan cerita kamu tidak betul?

J: Tidak pasti. Tapi saya rasa betul.

S: Apa yang kamu beritahu Mahkamah hari ini, adakah benda itu berlaku ataupun tidak?

J: Berlaku.

S: Kamu pasti?

J: Pasti.

SP16: Dilepaskan.

[165] From his answers to the questions posed to him by Encik Ahmad Akram, the learned DPP, in his re-examination, which arose as a result of two of his answers given towards the tail end of his cross-examination which were in sharp contrast to his

A answers given in his examination-in-chief and the major part of his cross-examination, the court was satisfied that the testimony of PW16 concerning what was related to him by the accused about the incident was cogent because it was positive, consistent, credible and was unshaken. More importantly, his testimony was
B corroborated by the events which had occurred recently and by the items which were recovered from the crime scene and other items belonging to the accused which were seized by the police.

[166] In his re-examination, PW16 was able to state the title of
C the article in the Kosmo magazine.

[167] From the manner in which PW16 answered the questions posed to him by the court, by the learned DPP and learned defence counsel, the court was satisfied that PW16 was conversant in Malay and that he had no difficulty in understanding
D the Malay language which was used in the Kosmo magazine and by the accused, by the IO, by ASP Somu (PW22), by Insp Harekrishnan (PW36), by Encik Ahmad Akram, the learned DPP, by Dato' Hanif, learned defence counsel and by the court.

E **[168]** The reasons are as follows:

(1) He was born in Malaysia and had lived in Malaysia and studied in a Malaysian school up until Standard 2.

(2) He had gone to Indonesia at the age of six.
F

(3) He had returned to Malaysia at the age of 14.

(4) He had worked in Malaysia for six years from the age of 14 until the age of 20.

G (5) He is used to conversing with PW13 and also Suhailee, his previous employer, in Malay; and

(6) He must have conversed with the locals in Malay by virtue of having resided in Malaysia for a good 12 years which period was broken up in two segments.
H

The Arrest Of The Accused In PW16's House By PW36 On 24 September 2010

[169] The court noted that the sworn oral testimony of Insp
I Harekrishnan s/o Subramaniam I/14794 (PW36), who arrested the accused and two others, ie, PW16 and Badeli, in the rented house occupied by PW16 on 24 September 2010, corroborated PW16's sworn oral testimony concerning the arrest.

[170] According to PW36, he was in a police team headed by SUPT Sahadan bin Jaafar G9463, with two other officers, namely, ASP Ng Man Fatt and Insp Hishamuddin bin Mohamad (PW35) and 19 men from the D9 division.

[171] On 24 September 2010, at 5.55am, they raided Wahid's (PW16's) house at Lot 2852K, Kampung Paya Jaras Hilir, Jalan Sungai Buloh, Batu 15, Sungai Buloh. During the raid, PW36 succeeded in arresting the three occupants in the house, ie, PW16, the accused and one Ahmad Badeli ("Badeli").

[172] PW36 also seized three hand phones. After the arrest, they took the three arrestees back to his office at D9 which was located at the Headquarters of the Kuala Lumpur Police Contingent.

[173] He then lodged a report. He identified P116 as his police report, ie, Sungai Plong Report 1929/2010, dated 24 September 2010.

[174] The court noted that the contents of his report (P116) corroborated his sworn oral testimony concerning the arrest of the accused and the two other men.

The Seizure Of Various Items By The Police From Four Places After The Arrest Of The Accused On 24 September 2010 Suspected By The Police To Have Been Used By The Accused To Make The Pomelo Bomb

[175] On the same day of his arrest, ie, on 24 September 2010, at 9.15pm, Insp Hishamuddin bin Mohamad (PW35) led a police forensic team headed by Insp Norazmi bin Awang (PW34) to PW16's house where PW34 found and PW35 seized the accused's laptop computer and other items mentioned earlier. PW35 issued a search list. He also lodged a police report concerning the seizure of the items, ie, Sungai Plong Report No. 1933/2010 (P106).

[176] Later the same night, at 10.15pm, the accused led PW35 and the same forensic team headed by PW34 to the car park of the Sungai Buloh Hospital. There he pointed out the car to PW35. PW34 then opened the car with the car keys recovered from PW16's house. PW34 then examined and searched the interior of the car. He found and PW35 seized a plastic packet of cable ties and also a screwdriver from inside the car. PW35 also

A seized the car. He issued a search list to the accused (P108). He also lodged a police report concerning the seizure, ie, Desa Jaya Report No. 7523/10 (P109).

[177] At about 11.20pm, the same night, the accused led PW35 B and the same forensic team to the accused's house in Bandar Tun Razak where PW34 found and PW35 seized some items from the house mentioned earlier. PW35 issued a search list (P110) to the accused. He also lodged a police report, ie, Sungai Besi Report No. 10575/10 (P111).

C

[178] However, the court has disregarded the testimony of PW34 that he took a swabbing of a substance on the floor of the balcony of the accused's house which he suspected to be black powder and which was subsequently sent to the government chemist for analysis. The reason is because right until the full trial D concluded the report of the government chemist was still unavailable.

[179] PW34 prepared and signed three acknowledgments of the handing over to PW35 of the various items found and gathered E by him at the three places mentioned above, ie, one for each of the three places. PW34 had packed and sealed all the items before handing them over to PW35. P34 identified P103 as the acknowledgment in respect of the seizure in PW16's house, P104 as the acknowledgment for the car park area in respect of the F seizure at the Sungai Buloh Hospital and P105 as the acknowledgment in respect of the seizure in the accused's house.

[180] Hence, the court noted that the seizure and handing over of the various items were well-documented and there was no G break in the chain of evidence.

[181] On the following day, ie, on 25 September 2010, at about 9pm, the accused led PW36 and his men to the Giant Supermarket where the accused showed to PW36 the counter (counter 9) from where he (the accused) had purchased two H pomelos and a screwdriver (the "three items"). He then asked Mr Ganesh s/o A Palanimalai (PW21), the manager of the Giant Supermarket, for the CCTV recording of the purchase transaction (the "second CCTV recording") at the counter and also the receipt for the payment for the purchase of the three items. I

[182] PW21 said he would locate the CCTV recording and the receipt.

[183] Five days later, ie, on 30 September 2010, at about 4pm, PW36 received a phone call from Mr Ganesh s/o A Palanimalai (PW21). PW21 informed PW36 that he had found the CCTV recording and the receipt.

[184] PW36 then called PW22 and asked him to contact PW21 in order to obtain the CCTV recording and the receipt from PW21.

[185] On 26 September 2010, the accused led PW35 to Suhailee's house in Taman Coalfields at Sungai Buloh where the accused showed to PW35 the accused's identity card, driving licence, a Memox Network Sdn Bhd business card and a few cards, ie, BHP petrol card, AmBank card, and a Petronas Mesra card which were placed on top of a refrigerator in the house. PW35 seized all the items and issued a search list to the accused. PW35 also lodged a police report, ie, Saujana Utama Report No. 1981/10 concerning his seizure of the items (P113).

[186] PW35 handed over all the seized items to PW22 on two dates, ie, 27 September and 4 October 2010. He identified P114 and P115 as the two acknowledgments of the handing over of the items to PW22.

The Opinion Of The Bomb Expert (PW37) That The Object Inside The Bag Which Caused The Fire And Explosion Upon The Lifting Up Of The Pomelos By GYS Was An Improvised Explosive Device (IED)

[187] According to DSP Zainal Abidin Atan G 8804 (PW37), who, at the material time, was the armaments officer and also the Head of the Bomb Disposal Unit of the Kuala Lumpur Police Contingent, he was of the opinion that the explosion was caused by an IED, ie, an improvised explosive device.

[188] On 29 August 2010, at about 10am, upon being informed of an explosion at the scene of the incident, he and his men proceeded to the ground floor of Block 2 of the Apartment Desa Tun Razak.

[189] Upon their arrival, they gathered at the ground floor of Block 2. Subsequently, he and his men proceeded upstairs to the scene of the incident, ie, in front of unit number 4, on the 12th floor of Block 2.

[190] As a bomb disposal expert his duty and responsibility were to search the scene of the incident in order to ensure that there was no threat from a second explosion. As a post-blast investigator,

his duty and responsibility were to ensure that there was no disturbance or damage caused to the crime scene during his search for a secondary IED, if any.

[191] In his opinion, the object which exploded and which spewed out petrol and fire upon the lifting up of the two pomelos by GYS was an IED. According to him, the IED in the instant case fell within the victim-activated category of IED. He explained that the two pomelos were used to attract the attention of the intended victim. Upon that person lifting up the pomelos the IED would be triggered off. Based on his expertise and special skills the court was of the view that he was competent to give his opinion pursuant to s. 45 of the Evidence Act 1950.

[192] The court accepted his opinion which corroborated the testimony of the sole eyewitness (PW9), PW12's testimony, the dying declaration of GYS to the doctor who treated him at HUKM upon his admission (PW23), "Ada bom!" "Ada bom!", the testimonies of PW14 and PW23 concerning the injuries suffered by NSH and GYS and the findings and opinions of the two forensic pathologists (PW10 and PW15) who conducted the post-mortem examinations on NSH and GYS concerning the cause of their deaths. The court, therefore, concluded that the object was an IED.

The Very Thorough And Comprehensive Investigations Which Were Undertaken By The Four Investigating Officers, ie, The First IO (PW38), The Two Forensic IOs (PW33 And PW34) And The Second IO (PW22) Upon The Directions Of DSP Shafie

[193] Insp Lew Kheng Joe (PW38) was the first IO assigned to carry out investigations into the instant case after the incident was reported to the police.

[194] At 9.15am, on the morning of 29 August 2010, he was notified by the Cheras Control Centre concerning the fire and explosion in front of the apartment. He gathered a number of police detectives and headed to the scene of the incident. They arrived at about 9.45am. At the scene, he did not see NSH and GYS but he saw some members of the public and two police personnel from the MPV unit who were guarding the crime scene.

[195] While he was at the scene he was informed of Sungai Besi Report No. 9539/10 (P9) lodged by Corp Arifin (PW5). Subsequently, he was also informed of a second report, ie, Sungai Besi Report No. 9543/10 (P10) lodged by Sgt Saodah (PW6).

[196] He also saw several firemen at the crime scene. They had already put out the fire. They were packing up their equipment and getting ready to leave the crime scene.

[197] At about 10am, DSP Zainal (PW37) and his men arrived. Their responsibility was to examine the crime scene in order to ensure that there was no threat or danger of a secondary explosion and that it was safe for him and the forensic team to carry out the investigations at the crime scene. After he had handed over the crime scene to PW37, PW38 interviewed a few of the civilians, including PW9.

[198] PW9 told him what had happened, ie, that when Ah Ti lifted up the two pomelos the fire and explosion occurred. They then went downstairs to the management office of the Apartment Desa Tun Razak which was situated on the ground floor of Block 2 to view the first CCTV recording. At the management office, he met Puan Hasnah binti Awang Kechil (PW19), the operator of the CCTV surveillance system. He watched the replay of the CCTV recording together with PW19, PW9 and PW12. However, as the replay was taking some time, he instructed the three of them to continue watching while he went upstairs to the crime scene.

[199] At the crime scene, he saw that PW37 and his men were still carrying out their investigations. At about 12 noon, he was informed by PW37 that the crime scene was safe from any secondary explosion. PW37 then handed over to him the crime scene to enable him to carry out his investigations. PW37 and his men then left the place.

[200] He drew a sketch plan of the external areas along the corridors of the 12th, 11th and ground floors of Block 2. He identified P118, P119 and P120 which had his signature on each of them as the three sketch plans drawn by him.

[201] In P118, ie, the sketch plan for the 12th floor, he had drawn the positions of NSH and GYS in front of the main door of the apartment based on the information provided by PW9. Looking at the sketch plan it is clear that the apartment is the first apartment on the right side of the lifts as one exits from any of the two lifts upon reaching the 12th floor.

[202] In P119, ie, the sketch plan of the 11th floor, he had drawn the presence of the broken pieces of glass, the pieces of the "mercun bola" and one pomelo.

[203] In P120, ie, the sketch plan of the ground floor, he had drawn the presence of the broken pieces of glass, the pieces of the "mercun bola" and the battery. He also saw one pomelo along the corridor on the ground floor as shown in one of the photographs. The court noted that one pomelo can be seen in the photograph P4 (24) and another pomelo can be seen in the three photographs (P4 (33, 34 and 36)). The court also noted that the pieces of "mercun bola" can be seen in three photographs P4 (41, 42 and 43).

[204] PW38 then entered the apartment. He saw on the floor of the apartment pieces of broken glass, the two broken pieces of the lower portion of the front wooden door and pieces of "mercun bola". He also saw the clothes and the other belongings of PW9 and NSH scattered about in the apartment. He then drew a sketch plan of the interior and the external surroundings of the apartment. He identified P120 as the sketch plan which he had drawn of the apartment.

[205] He then waited in the corridor until the arrival of the forensic team which was headed by SUPT Soo Mee Tong (PW32) at 1.30pm. He then handed over the crime scene to PW32 but he did not leave the crime scene. Hence, he was able to see Insp Somchard (PW31) collecting and gathering the pieces of "mercun bola" into three groups as shown in the three photographs (P4 (41), (42) and (43)). He also saw PW31 tagging the other items found at the crime scene as shown in the photographs (P4 (37 to 68)).

[206] PW38 then left PW31 and PW32 at the crime scene and returned to the management office on the ground floor where he was told by PW9 that PW9 had seen a man whom PW9 identified as "Khayry" carrying a blue bag entering the lift on the ground floor and then walking out of the lift on the 12th floor towards to the right side of the lift. About one or two minutes later PW9 saw "Khayry" walking back into the lift empty handed. Subsequently, PW9 saw "Khayry" exiting the lift on the ground floor.

[207] PW38 then instructed PW19 to print out a clear picture of the face of "Khayry" and to keep the CCTV recording to enable Insp Ameyruddin (PW24) to make a copy of the CCTV recording the following day.

[208] PW38 then went back upstairs to the crime scene where he received from Insp Mohd Aizam bin Mohamad (PW33) 16 items which the latter had collected from the crime scene. He then took the items back with him and kept them in the cabinet in his office in order to hand them over to ASP Marlino, who was on duty that day, as directed by his superior officer, DSP Shafie, the acting officer-in-charge of the Cheras police district.

[209] PW38 tried to get in touch with ASP Marlino several times over the phone but failed. Subsequently, he was informed by the latter that the latter was ill and was on two days medical leave. PW38 reported the matter back to DSP Shafie and the latter directed ASP Somu (PW22) to take over the investigations of the two reports concerning the incident.

[210] At 9pm, PW38 was informed that NSH had passed away.

[211] At 1am, the following morning, PW22 arrived at PW38's office. PW38 briefed PW22 about the investigations into the incident. PW22 then took over the investigations of the two reports (P9 and P10) concerning the incident.

[212] At 9.30am, the following day, ie, 30 August 2010, both PW22 and PW38 arrived at the crime scene where the latter briefed the former about the crime scene. PW22 then left the crime scene and proceeded to HUKM to attend the post-mortem examination of NSH whilst PW38 stayed behind to wait for Insp Ameyruddin (PW24) to arrive.

[213] At about 10am, PW24 arrived. Both of them then met with PW19 and two male Chinese, namely, Mr Chin Tiam Pin, who had sold the CCTV system to the management of the Apartment Desa Tun Razak, and Mr Liu Chee Siong, who had sold the CCTV system to Mr Chin Tiam Pin.

[214] PW38 briefed PW24 about the incident and the relevant parts of the CCTV recording. PW24 then made a copy of the CCTV recording in the form of a CD which he handed over to PW38 in an envelope. PW38 took them back to his office and kept them in the cabinet in his office.

[215] On 1 September 2010, at about 11.30am, he handed them over to PW22. He also prepared and signed an acknowledgment (P122) of the handing over to and receipt of the two items by PW22 and PW22 also signed the acknowledgment.

[216] PW38 identified P13 b and c as the CD and envelope.

[217] The court found PW38 to be a truthful witness and his evidence consistent and credible. The court also found that his evidence corroborated the evidence of PW9, PW12, PW19, PW22, PW24, PW31 and PW32. Based on the evidence of the other prosecution witnesses and his evidence the court was satisfied that the identity of "Khayry" in the first CCTV recording and the items seized from the crime scene were sufficiently proved by the prosecution as there was no break in the chain of the evidence concerning the items seized and produced in court, in particular, a copy of the first CCTV recording contained in the CD, the two pomelos and the other items found at the crime scene.

[218] PW22 is the second IO of the instant case. His testimony corroborated the testimonies of the prosecution witnesses.

[219] Upon being directed by DSP Shafie, the Head of the District Criminal Investigations Division, on 30 August 2010, at 12.30am, PW22 took over the investigations of the instant case from the first IO (PW38).

[220] Although there were two police reports lodged in connection with the incident, he regarded the police report which was taken down by Sgt Saodah (PW6), ie, Sungai Besi Report 9539/10 (P10) as the first information report ("FIR") because the information was received earlier and it was referred to the officer-in-charge of the police district before she lodged the report.

[221] In accordance with PW22's directions, 14 photographs (P18 (1-14)) were taken of the scene of the incident by L/Corp Mohd Shahrul Nizam on 29 August 2010 at about 4.30pm.

[222] In accordance with his instructions, L/Corp Masiri (PW2) took 14 photographs (P5 (1-14)) of the post-mortem examination of NSH by PW10.

[223] In accordance with his instructions, Corp Mukthasam Mohamad (PW3) took 11 photographs (P7 (1-11)) of the post-mortem examination of GYS by PW15. GYS's death was reported by Corp McGrady Sylvester (PW39) *vide* Dang Wangi Report No. 31394/2010 (P123).

[224] PW22 recorded a statement from Mr Tan Ah Yap, the owner of BTR Hardware Sdn Bhd, the hardware shop, at No. 6, Jalan Budiman 24, Taman Mulia, Bandar Tun Razak. The court noted that this witness was offered to the defence at the close of the prosecution case.

[225] PW22 also met with Puan Siti Syafina (PW26) the cashier who sold the three items to the accused at the Giant Supermarket at 8.39pm on the night before the incident.

[226] On 1 October 2010, at about 12pm, PW22 went to the Giant Supermarket and met Mr Ganesh, the manager of the Giant Supermarket (PW21) and Puan Mazura, the operator of the CCTV system of the Giant Supermarket (PW25). PW22 also viewed the second CCTV recording and he seized the video cassette (P27) containing the second CCTV recording together with the cover (P28). PW22 issued a search list (P23) to PW25 and he also lodged a police report (P22).

[227] The testimony of the IO (PW22) concerning the two police reports lodged in connection with the same incident and what he saw when he viewed the first CCTV recording (at p. 476, line 26 to p. 479, line 30 of the notes of evidence) is reproduced below:

> 9539/10. Itu berkenaan laporan polis. Berkenaan ASP Marlino, semasa di tempat kejadian, beliau telah terima arahan agar kes ini disiasat oleh pegawai penyiasat kanan yang berpangkat ASP. Mengikut urutan kes menarik adalah urutan ASP Marino untuk mengambil siasatan kes ini. Pada mulanya beliau setuju, beliau menyatakan beliau ada masalah kesihatan dan hendak pergi ke klinik. Pada petangnya, beliau nyatakan beliau tidak sihat dan tidak mampu untuk jalankan kes ini dan beliau MC pada hari tersebut. selepas ASP Marino adalah giliran saya, Ketua Siasatan Jenayah Daerah telah arahkan saya untuk ambil siasatan. Oleh itu, apabila saya terima semua ekshibit ini, saya dapati ada dua perkara yang berbeza iaitu nombor report dan nama. Saya repacking semua ekshibit saya yang saya terima ini dengan menyatakan nombor report adalah Sg. Report 9539/10 dan meletakkan nama saya sebagai pegawai penyiasat.
>
> S: Kamu ada terima satu CD yang bertulis A1. Rujuk P13B yang didalamnya adalah P13C.
>
> J: Ya. Saya cam CD ini.
>
> S: Apa tindakan kamu? Selepas terima barang ini, kamu simpan di mana? Apa kamu buat dengannya?

J: Selepas saya terima semua barang kes, barang ini disimpan dalam pejabat saya. Lebih kurang jam 11.45, saya telah melihat rakaman CCTV bertanda A1 bersama Insp. Liew di pejabat saya. Hasil tontonan dan semakan saya mendapati, dalam kandungan CD tersebut adalah, lebih kurang 3.09 pagi, telah nampak seorang lelaki dengan membawa satu beg dengan di atasnya ada satu bungkusan plastik telah berjalan kaki dan masuk ke dalam lif di tingkat bawah dan seterusnya, keluar dari lif di tingkat 12 dan menghala ke sebelah kanan lif. Dalam masa 39 saat, lelaki yang sama telah kembali ke lif tanpa membawa beg yang dibawanya. Seterusnya, beliau turun ke aras bawah dan beredar daripada situ dengan berjalan kaki lebih kurang jam 3.12 pagi.

S: Mohon kebenaran memainkan P13C. Channel 11A.

J: Ya.

S: Sebagai pegawai penyiasat, di mana tempat ini?

J: Ini adalah kawasan parking, di tingkat bawah, blok 2. Saya nampak seorang lelaki dengan membawa satu beg berwarna biru.

S: Channel 11A dimainkan dan dicamkan. Saya mainkan channel 10A. Adakah ini salah satu klip yang kamu tonton?

J: Ya. Ini adalah aras bawah, kamera menunjuk kepada lif di dalam Blok 2, Apartment Desa Tun Razak. Saya nampak lelaki yang sama sebentar tadi telah sampai ke lif dengan membawa beg yang sama. Dia masuk ke dalam lif.

S: Kamu cam ini adalah antara video klip yang kamu tonton?

J: Ya.

S: Channel 4C. Gambar ini diambil di mana?

J: Gambar CCTV ini menunjukkan di aras 12. Boleh nampak '12' di situ. Nampak lelaki yang masuk di bawah tadi, keluar di aras 12 dan masih membawa beg yang sama. Beliau telah keluar dan menghala ke sebelah kanan. Bila saya melawat tempat kejadian, sebelah kanan adalah tempat kejadian di mana letupan itu berlaku. Lelaki yang membawa beg tadi telah keluar dari lif bersama dengan beg, dan sekarang kembali ke lif dan turun ke bawah tanpa membawa beg tersebut. Duration yang diambil adalah 39 saat.

S: Channel 10C.

J: Di aras bawah. Tempat yang sama dengan mula-mula. Saya dapat lelaki yang sama tadi beredar keluar dari lif dan beredar daripada situ terus ke basement tanpa membawa sebarang beg.

S: Kamu camkan ini rakaman yang kamu tengok?

J: Ya, saya mengecamkan.

S: Setelah tonton klip tersebut, apa yang berlaku?

J: Saya bukan sahaja menonton rakaman CCTV ini, saya telah membuat own reservation. Saya mendapati lelaki yang membawa beg tersebut, kehadiran dia dari yang dirakam adalah lebih kurang 3 minit sahaja. Dari tingkat bawah, masuk lif, naik atas, keluar lif, keluar ke kanan, kembali ke lif, turun bawah dan beredar dari rakaman CCTV, dalam 3 minit. Kehadiran beliau adalah pada jam 3.09 minit dan beredar lebih kurang jam 3.12 minit. Duration yang beliau tinggalkan beg, di tingkat 12 adalah 39 saat.

S: Selepas tonton CCTV, apa dibuat?

J: Selepas itu, saya dibantu oleh Insp. Lew untuk membungkus semula ekshibit ini atas nombor report Sg. Besi 9539/10 dan saya letakkan nombor siasatan Cheras IP5679/10, nama saya dan tandatangan. Semua ekshibit ini telah repacking dalam envelope serta berseal Polis Diraja Malaysia 448. Bukan semua. Ekshibit 2 – 7, kecuali 8, 9 – 12, dan 14 – 17. Saya letakkan dalam sampul surat. Ekshibit bertanda 8 dan 13, iaitu dua biji limau barli, repacking dalam beg plastik lutsinar dan di seal Sg. Besi 9539/10, Cheras IP5679/10, nama saya dan tandatangan. Ini adalah 17 ekshibit yang dikumpul daripada Tuan Soo Mee Thong dan saya terima melalui Insp. Liew. Manakala satu lagi ekshibit iaitu CD yang bertanda A1 yang disediakan oleh Insp. Amer, saya telah masukkan dalam envelope Urusan Seri Paduka Baginda di seal Sg. Besi 9539/10, Cheras IP5679/10, nama saya dan tandatangan, berseal Polis Diraja Malaysia 448. Envelope ini ditandakan sebagai S18. Semua ekshibit ini ditandakan S2 sehingga S18. Boleh camkan jika dirujuk.

S: ID32, ID33, ID69A, ID69C, ID34, ID35, ID36, ID37, ID38, ID39, ID40, ID41, ID42, ID43 dan ID13A. Rujuk semua kepada saksi.

J: Ada kesemuanya.

[228] The testimony of PW22 concerning his seizure of P27 containing the second CCTV recording (at p. 495, line 12 to p. 496, line 16 of the notes of evidence is reproduced below:

S: Mengenai rakaman, mengapa kamu rampas?

J: Dalam siasatan saya, mendapati di tempat kejadian, telah ditemui dua buah limau barli. Selepas mangsa mengalihkan limau tersebut, letupan telah berlaku. Kedua, dalam siasatan Insp. Hisyam, beliau telah merampas satu screwdriver yang berwarna hijau. Apabila saya melihat rakaman CCTV, kedua-dua barang ini telah dibeli oleh seorang lelaki Melayu. Based on rakaman CCTV tempat kejadian, wajah suspek, saya telah membuat tangkapan terhadap suspek, dan fizikal yang ada pada rakaman CCTV memang mirip kepada Tertuduh. Satu lagi barang telah dijumpai di kereta yang telah dirampas oleh Insp. Hisyam.

S: Sebab itu kamu rampas CCTV ini?

J: Ya. Untuk keterangan di Mahkamah.

S: Selepas di Giant, apa lagi berlaku hari itu?

J: Pada 1545 hrs, saya telah diserahkan satu paip pvc dan 4 elbow yang dirampas oleh Insp. Hisyam kepada saya. Turut diserah adalah borang bongkar yang dibuat oleh beliau.

S: Ada buat serah menyerah?

J: Ada. Boleh cam jika dirujuk.

S: Rujuk satu borang. Betul ini borang serah menyerah kamu dengan Insp Hisyam?

J: Ya. Ada tandatangan saya.

S: Dua barang kes ini, ada apa-apa penandaan?

J: Ada. Saya telah menandakan paip pvc sebagai SPP, dan elbow sebagai SPB.

S: Rujuk ID88A dan ID71 (1-4). Adakah ini paip pvc yang kamu terima?

J: Ya, saya camkan. Begitu juga dengan 4 elbow ini.

TPR : ID88A mohon dijadikan ekshibit pendakwaan. Juga ID71 (1-4), juga mohon dijadikan ekshibit pendakwaan.

Mahk : ID88A dijadikan P88A, dan ID71 (1-4) dijadikan P71 (1-4).

[229] PW22 also seized one PVC pipe (P88A) and four elbows (P71 (1-4)) which were initially seized by Insp Hishamuddin (PW35) from the inside of the accused's car. PW35 had issued a search list to the accused.

[230] PW22 obtained the receipt for the purchase of the three items (P30) from Encik Mohamad Hazlin bin Hamzah (PW27), the chief cashier at the Giant Supermarket.

[231] Insp Hishamuddin bin Mohamad (PW35) also seized a laptop (P78) from the accused which he handed over to PW22.

[232] PW22 handed over the laptop (P78) and the three hand phones recovered in PW16's house by PW36 to Insp Suzana (who was offered to the defence) for her analysis.

[233] PW22 received three police reports (P106, 109 and P111) from Insp Hishamuddin (PW35) with regard to the three seizures of the items at the three different places and also the three search lists (P107, P108 and P110) issued by him.

[234] In accordance with PW22's instructions, Const Zati Hayat Zamani (PW1) took 69 photographs (P4 (1-69)) at the scene of the incident and the surrounding areas.

[235] PW22 received the green coloured Proton Saga car bearing registration No. BCX 5260 (the "car") from Insp Hishamuddin (PW35) as shown in the two photographs (P6 (1 and 2)).

[236] Insp Ameyrudin (PW24) analysed the video cassette which contained the second CCTV recording of the accused purchasing the three items at the Giant Supermarket. He prepared a report (P20), which contained his findings, which he handed over to PW22.

[237] PW22 handed over the four elbows, one PVC pipe, one white coloured electric wire cover and some cable ties recovered and seized by Insp Hishamuddin to Insp Somchard (PW31) on 10 October 2010, at about 2pm, for his forensic analysis, as corroborated by the handing over acknowledgment (P99) signed by both of them.

[238] In his testimony which was corroborated by his report (P101), PW31 found similarities in the characteristics of the cable ties seized by Insp Hishamuddin and the bunch of burnt cable ties plus the two cable ties which were tied to the wire in one of the

two pomelos recovered from the crime scene. Based on his findings, the court found that there was a connection between the accused and the pomelo bomb used in the incident.

[239] The government chemist, Dr Mohd Shukri (P29) prepared two reports (P91 and P17), which contained his findings concerning his analysis of the five samples of blood and stomach contents of NSH and GYS taken during their post-mortem examinations by the two forensic pathologists, which he handed over to PW22 together with the five samples.

[240] PW22 received 20 items from Insp Somchard (PW31) and two handing over acknowledgments (P98 and P100) for the 16 and four items, respectively.

[241] PW22 also received the chemist report (P94) from another government chemist, Encik Shaari (PW30), containing his findings on his analysis of seven of the 16 items, recovered from the crime scene by Insp Somchard (PW31) under the supervision and direction of SUPT Soo Mee Tong (PW32), which were packed, sealed and handed over to PW22 by Insp Mohd Aizam (PW33). PW22 then handed them over all the 16 items to PW31 for his analysis.

[242] PW22 received two reports (P97 and P101) from Insp Somchard (PW31) which contained his findings on the analysis carried out by him. The court noted that based on his findings contained in P97, one of the two pomelos recovered from the crime scene had two cable ties which were tied to a wire placed inside the pomelo. These items can also be seen from the photograph taken of the pomelo, marked as S13, at the crime scene by the police photographer.

[243] After his examination and analysis, PW31 sent seven items out of the 16 items to the government chemist (PW30) through PW22 for further analysis.

[244] The court noted that PW30 found the presence of petrol on one of the seven items, ie, a broken piece of partially burnt (cardboard) paper, and the presence of black powder usually found in firecrackers and fireworks on all the seven items. The court found that PW30's evidence corroborated PW9's evidence on the presence of petrol inside the bag containing the box and the two pomelos before the fire and explosion occurred. PW9 also said he saw petrol on GYS's face after GYS lifted up the pomelos.

[245] On 7 February 2011, at about 3.30pm, PW22 received five exhibits from Madam Revathi, the chemist who is also a DNA expert, together with her chemist report.

[246] PW22 handed them over to Sgt Mohd Fauzi (PW28), the keeper of the exhibits store of the Cheras Police District Headquarters, on 12 May 2011 and 25 November 2011, respectively, for safekeeping. He identified ID87 and ID88 as the two entries in the register.

[247] PW22 received the two post-mortem examination reports of NSH and GYS (P14 and P6) from the two forensic pathologists.

[248] PW22 was asked what were the results of his investigations into the FIR lodged by Sgt Saodah concerning the incident at p. 497, line 28 and what he said at p. 506, line 28 onwards until p. 507, line 26 is reproduced below:

S: Sebagai pegawai penyiasat, apakah hasil siasatan kamu?

J: Siasatan di tempat kejadian pada hari kejadian telah dibuat oleh Insp. Lew Kheng Joe. Beliau telah menerangkan kepada saya apakah yang beliau perolehi di tempat kejadian. Berdasarkan daripada maklumat daripada beliau dan juga pegawai forensik, saya mendapati dalam kejadian ini, suspek yang terlibat adalah seorang sahaja. Ini jelas boleh dilihat daripada rakaman CCTV di dalam bangunan Desa Tun Razak di mana seorang sahaja yang membawa satu beg ke tingkat 12 dan keluar dari lif dan menghala ke tempat kejadian, dan seterusnya dalam masa 30 saat, dia kembali ke lif dengan meninggalkan beg tersebut. saksi utama dalam siasatan saya iaitu Mr. Lim yang nampak kejadian letupan yang menyebabkan kematian 2 orang mangsa mengesahkan beg yang dibawa oleh orang yang di dalam CCTV adalah beg yang dijumpai di hadapan rumah dan apabila mangsa Goh Yong Seng mengangkat limau barli, letupan telah berlaku. Letupan ini berlaku di hadapan mata beliau. Selain itu, Mr. Lim juga mengesahkan orang yang membawa beg adalah Tertuduh kepada saya. Ini dapat dijelaskan, kerana Mr. Lim memang mengenali Tertuduh. Dalam prosedur kawad cam, beliau juga telah mengecam Tertuduh. Selain itu, saya juga mendapat saksi saksi lain yang dirakam percakapan, antaranya Sharif yang memberikan mercun bola di Kedah dan juga pekerja Tertuduh sendiri iaitu Zulkarnain. Di mana Tertuduh pernah bercerita dengan Zulkarnain hendak membuat sesuatu kepada mangsa. Selepas kejadian ini berlaku, Tertuduh telah confess kepada 3 orang rakannya tanpa sebarang paksaan, ugutan atau dorongan iaitu Suhaili,

> Nordin dan Abd. Wahid. Beliau nyatakan, beliaulah punca kejadian kematian dalam kes ini. Saya juga mengenalpasti motif kejadian. Motif kejadian lebih kepada masalah kewangan atau hutang antara Tertuduh dengan si mati pertama. Mengikut keterangan Mr. Lim, beliau memberitahu mangsa Hong Siew Hong ada memberitahu ada masalah antara beliau dengan Tertuduh sehari sebelum kejadian.

[249] From PW22's evidence, the court was satisfied that there was consistency between the statements made by the witnesses to PW22 as mentioned in PW22's answers and their sworn oral testimonies in court. Hence, I was of the view that the witnesses were truthful witnesses and their testimonies in court were credible.

[250] As the two other persons who were arrested together with the accused in Wahid's (PW16's) house, ie, Wahid (PW16) and Ahmad Badeli, PW22's investigations revealed that they were not involved in the incident.

[251] However, Wahid (PW16) disclosed to PW22 the confession made by the accused to him (PW16). Hence Wahid was called as a witness while Ahmad Badeli was offered to the defence at the close of the prosecution case.

[252] The court noted that PW22 had taken over the investigations about 16 hours after the incident from the first IO, Insp Lew Kheng Joe (PW38).

[253] The court also noted that there was an interval of five hours between the time, when the accused was seen entering the lift with the bag, ie, 3.09am, and the time, when the incident occurred, ie, about 8am or 8.30am (the "five hours interval").

[254] In his cross-examination, it was suggested to PW22 by Dato' Hanif that since PW22 did not investigate the CCTV recording for the five hours interval and the identity of the occupant of the apartment next door to PW9's apartment there was a possibility that someone else could have placed the bag containing the box and the two pomelos which PW9 saw outside his apartment, which later exploded when GYS lifted up the pomelos.

[255] As to motive, it was also suggested to PW22 that since there was no record which showed that the accused had owed money to NSH there was a doubt as to the truth of the alleged indebtedness of the accused to NSH as a motive for the murder of NSH by the accused.

[256] PW22 agreed with the suggestion of learned defence counsel that based on his investigations and the statements of the witnesses the accused had a close relationship with NSH prior to the incident.

[257] PW22 agreed that the blue bag was not recovered from the crime scene and only the pieces of the box, the blue coloured pieces of plastic and the two pomelos were left at the scene and retrieved and handed over to Insp Lew Kheng Joe by the forensic team led by PW32.

[258] PW22 also agreed with the suggestion of the learned defence counsel that even the bomb expert (PW37) did not know how the bomb was made and how the explosion had occurred.

[259] PW22 also agreed with the suggestion of learned defence counsel that the two pomelos found at the crime scene were not sent to the government chemist for analysis but he disagreed that this was important and should have been done.

[260] PW22 disagreed with the suggestion of learned defence counsel that the firemen were material witnesses and it was essential to record their statements and obtain their report for his investigations.

[261] PW22 agreed with the suggestion of learned defence counsel that he did not investigate whether the motive for the incident was due to rivalry over the gaming business aspect of the internet café. Nevertheless, PW22 agreed that it was a lucrative business.

[262] PW22 agreed with the suggestion of learned defence counsel that the items found at the scene included two pomelos (P72 and P73), burnt firecrackers and pieces of paper.

[263] PW22 also agreed with the suggestion of learned defence counsel that the firecrackers had to be burnt in order to trigger off the pomelo bomb and to cause the fire and the explosion which killed NSH and GYS.

[264] In his re-examination, PW22 explained that he was of the view that it was not necessary for him to record statements from the firemen or to obtain the report from the fire department as to the cause of the fire and explosion because the causes of both were already known to him by virtue of what was told by PW9 to PW38 and by PW38 to him before the firemen arrived at the crime scene to put out the fire and also later by PW9 to him.

[265] PW22 also explained that he did not investigate the possibilities posed to him by learned defence counsel in his cross-examination because PW22 was informed by Zulkarnain that the accused had expressed his desire to do something to NSH, PW22 was informed by PW9 that the night before the incident NSH told PW9 that NSH had a problem with the accused and the incident had occurred the very next day, PW22 was informed by Nordin and Abd Wahid that the accused had confessed to them that he was responsible for the incident concerning the explosion, PW22 did not know how the pomelo bomb was made but he knew how it was triggered based on what was said by PW9, ie, that it was triggered after GYS lifted up the two pomelos.

Issue (1): Whether The Prosecution Has Proved A Prima Facie Case Against The Accused At The Close Of The Prosecution Case?

[266] At the close of the prosecution case, the court had to consider the issue whether the prosecution has proved a *prima facie* case against the accused at the close of the prosecution case.

Submissions Of The Prosecution At The Close Of The Prosecution Case

[267] At the close of the prosecution case, the learned DPP submitted that the prosecution has established all the ingredients of the two counts. The reason is because the prosecution has proved the following:

(1) The accused had a motive to kill one of the two deceased persons;

(2) The accused made preparations in furtherance of his intention to kill one of the two deceased persons;

(3) He was seen in the first CCTV recording carrying the bag to the 12th floor;

(4) PW9 identified the man in the first CCTV recording as the accused;

(5) The conduct of the accused in running away after the explosion in which the two deceased persons died;

(6) The accused changed his car before he ran away to his friend's house;

(7) He admitted to his friends he did the bombing;

(8) He took the police to the place, ie, the Giant Supermarket, where he bought the two pomelos and the screwdriver the night before; and

(9) DSP Zainal (PW37) said the bomb was of a type which was triggered off when the victim removes some object on the bomb and that object is to attract the attention of the victim.

[268] Therefore, the circumstantial evidence is extremely strong like a rope to show it was the accused, and no else, who had committed the offence and the accused's defence ought to be called because the accused must explain his conduct. He cited the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19 in support of his submissions.

Submissions Of The Defence At The Close Of The Prosecution Case

[269] Dato' Hanif Hashim and Encik Redzuan bin Dato' Hanif, learned defence counsels, submitted that the accused ought to be acquitted and discharged at the close of the prosecution case without calling him to enter his defence to the two counts of murder as the prosecution had failed to establish a *prima facie* case against the accused.

[270] They relied on the following grounds in their written and oral submissions:

(1) There was no direct evidence that the person who made the bomb was the accused.

(2) There was no direct evidence that the bag which the accused was seen carrying in the first CCTV recording contained the bomb and the two pomelos.

(3) There was no direct evidence that the accused was the person who had placed the bag containing the bomb at the place where PW9 saw the bag on the floor in front of his front door;

(4) There must be evidence that the bomb was inside the bag which was being taken by the accused as he entered and exited one of the two lifts;

(5) The bag and the box which PW9 said he saw inside the bag were not recovered from the scene of the incident. The bag was not produced in court and none of the firemen was called so there is a doubt whether the bag existed at that point in time and, therefore, s. 114 of the Evidence Act 1950 is applicable against the prosecution;

(6) The accused was used to losing during his gambling sessions and yet he did not do it earlier;

(7) The accused had no motive or reason to harm or kill NSH because it was a well known fact that the accused had a close relationship with her prior to the incident and there was a doubt concerning the alleged indebtedness of the accused to NSH as a motive for the murder of NSH because there was no record of the accused's indebtedness to NSH;

(8) The accused also had no motive or reason to harm or kill GYS;

(9) There is no evidence that the accused tried to run away and there is only evidence that the accused left his home because he was chased out by his wife. The act of the accused in leaving his home and going to his friend's house and in going to stay with PW16 was an innocent act and was done not because of his involvement in the incident and because the accused wished to escape arrest but because he was chased out of his house by his wife who suspected that he had an affair with another woman;

(10) The bomb could have been planted there by one of the disgruntled patrons who had gambled and lost or by someone unhappy and angry with PW9 and NSH for operating the illegal internet café in a residential area and allowing school children to patronise it or by a business rival of NSH and PW9 since the evidence showed that the

business of internet online gaming is a lucrative business and because the bag was not found at the scene of the incident and only the pieces of the box were found;

(11) There was no direct evidence that the accused had used the two pomelos purchased by him to make the bomb because the two pomelos found at the scene of the incident were not identified by any of the prosecution witnesses as the same two pomelos which were purchased by the accused from the Giant Supermarket;

(12) The two pomelos ought to be sent to the chemist for analysis to determine whether they were used to make the bomb;

(13) The objects found at the scene were not handed over to the expert for his analysis and opinion whether they were the component parts of the bomb;

(14) PW18, who had handed over the two packets of "mercun bola" to the accused, one month before the incident, could not identify the "mercun bola" shown in the photographs produced in court during the trial as the same "mercun bola" which he had handed over to the accused;

(15) DSP Zainal (PW37) did not do the simulation of the bomb. He was only an observer and Corp Katiman who did the simulation was not called as a witness;

(16) There are material gaps in the prosecution case and adverse inferences ought to drawn against the prosecution for its failure to call the following material witnesses:

(a) Corp Katiman, the police officer, who conducted the simulation of the bomb, and so the court was left in the dark as to how the bomb was made and, in particular, how it had exploded, ie, what had triggered off the bomb since one of the prosecution witnesses had said that the black powder inside the "mercun bola" needed a flame or spark in order to ignite it, thereby creating a doubt in the prosecution case that the bomb was made by the accused; and

(b) The firemen who were the first to arrive at the scene of the incident were not called to testify as to what was the cause of the fire, what they saw on their

arrival, what they did in the course of putting out the fire and that, therefore, there was a possibility, that important evidence left behind after the fire and explosion, which could have shown the identity of the real culprit had been washed away or destroyed by the powder or water used by the firemen to put out the fire.

(17) The identification of the accused by PW12 and PW9 in the two identification parades is flawed and ought not to be accepted by the court because the two identification parades were defective or irregular. The reasons are as follows:

(a) Firstly, PW40, the officer who conducted them said the participants wore special clothes but he could not remember the clothes the accused was wearing; and

(b) Secondly, PW40 did not record in the two reports of the two identification parades (P124 and P125) the important particulars of the participants, ie, their names, ages and a description of the physical characteristics of each of the participants in each of the two identification parades.

(18) The two deceased persons did not die at the scene of the incident. The doctors who treated the two deceased persons were not called and this created a material gap because they could have explained why they could not save the lives of the two deceased persons and in order to rule out the possibility that the two deceased persons had died because of the negligence of the hospitals in treating them; and

(19) If the accused really wanted to abscond the police would not have been able to catch him.

Decision Of The Court At The Close Of The Prosecution Case

[271] At the close of the prosecution case, after having carefully considered the submissions made by both the parties, the cases cited by them in support of their submissions and the evidence adduced by the prosecution, oral, documentary and physical, the court was satisfied that the prosecution had succeeded in establishing a *prima facie* case against the accused as per the two counts of murder.

[272] The court was satisfied that the prosecution had adduced sufficient credible evidence to prove each and every ingredient of the two counts of murder against the accused which would warrant his conviction unless rebutted or explained by him pursuant to s. 180(4) of the Criminal Procedure Code (the "CPC").

[273] The court ordered the accused to make his defence to the two counts of murder.

[274] The three options were explained to the accused by the court, ie, firstly, by giving evidence on oath in the witness box, or secondly, by making a statement from the dock or thirdly, by remaining silent.

[275] The court explained the implications of each of the three options to the accused, ie, if he were to choose the first option, he would be questioned first by his learned counsel, then by the learned DPP and then by his learned counsel; if he were to choose the second option, he would not be questioned by either his learned counsel or the learned DPP but the weight which the court could give to a statement made by him in the dock would be little when compared to his sworn oral testimony if he were to choose the first option; and if he were to choose the third option, the court would immediately find him guilty as charged, convict him for the two offences of murder and impose upon him the mandatory death penalty for each of the two offences.

[276] After consulting his learned counsel the accused elected to make his defence by giving evidence on oath.

[277] The accused testified as DW1. He also called two other witnesses. They are Abdul Aziz bin Omar as DW2 and Zulkifli bin Yeop as DW3.

The Reasons For Calling The Accused To Enter His Defence To The Two Counts Of Murder

[278] The reasons why the court ordered the accused to enter his defence to the two counts of murder are as follows:

[279] In my judgment, the prosecution has proven a case against the accused on the standard of *prima facie* as provided under s. 180 of the Criminal Procedure Code ("CPC") and explained in

A the Federal Court's decision of *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 1 AMR 321 as follows at pp. 99 to 100 (CLJ); pp. 338 to 339 (AMR):

> Section 180(1) makes it clear that the standard of proof on the
> B prosecution at the close of its case is to make out a *prima facie* case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the Prosecution has proved its case beyond reasonable doubt ... A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that
> C the evidence adduced must be such that it can be overthrown only by evidence in rebuttal ...
>
> The result is that the force on the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its
> D existence so probable that a prudent man ought to act upon the supposition that those facts exists or did happen ... In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to
> E determine whether the elements of the offence have been established ... Since the court, in ruling that a *prima facie* case had been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted ... (emphasis added).

F

[280] In *Parlan Dadeh v. PP* [2009] 1 CLJ 717 Augustine Paul FCJ in delivering the judgment of the Federal Court held that evidence of conduct is admissible under s. 8 of the Evidence Act 1950 from which the court can make an inference as to the
G knowledge and/or intention of the accused.

[281] His Lordship said as follows at pp. 742D to 747F:

> [28] Evidence of conduct is admissible under s. 8 of the Evidence Act 1950 ("s. 8") which reads as follows:
>
> H
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or
> I proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an

offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[29] Illustration (i) to s. 8 reads as follows:

A is accused of a crime.

The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

[30] In commenting on the admissibility of evidence of conduct under s. 8 *Sarkar on Evidence* 15th edn says at p. 175:

The conduct of party to a proceeding or his agent in reference to such proceeding at the time when the facts occurred out of which the proceeding arises, or in reference to any fact in issue or relevant fact, or the conduct of the complainant, is relevant; but the condition precedent to its admissibility as 'conduct' is that it must directly influence or be influenced by a fact in issue or relevant fact and such conduct does not include action resulting from other causes or circumstances. It must be the essential complement of the act done or refused to be done. Conduct includes antecedent or subsequent conduct involving both actions and statements.

And at p. 194:

What is meant by the words, if such conduct influences or is influenced by any fact in issue or relevant fact, is that there must be a direct or immediate relation between the conduct and the fact in issue. Conduct which is brought about by some other agency though connected with the facts in issue is not relevant conduct.

[31] The effect of evidence that complies with the requirements of s. 8 and when it does not can be seen in the case of *Kuldip Sharma v. The State* [1996] Cri LJ 244 where JB Goel J said at pp 250-251:

The occurrence had taken place sometime during night of first or 2nd 1985. The accused was found absent from his house next morning. He was absconding after the occurrence. Learned counsel for the appellant has contended that the mere fact of absconding or having been last seen together, is not incriminating circumstance justifying

A conviction. For this, he has relied on *State of Rajasthan v. Smt. Kamala*, AIR [1991] SC 967, *Inderjit Singh v. State of Punjab*, AIR [1991] SC 1674, *Satish Kumar v. State*, [1994] (IV) CCR 2579 (DB) (Bombay) and *Lakhanpal v. State of Madhya Pradesh*, [1979] Cr LJ 1217 (SC). In these cases, except the evidence of last seen together or absconding, no other circumstantial evidence was proved or found reliable and trustworthy to form a chain of circumstances complete enough to base conviction. The conduct of the accused soon after the incident plays an important part in the determination of the guilt and is a corroborative piece of evidence. Disappearance of the accused after the occurrence is a relevant circumstance which in the absence of any plausible explanation, could be taken into consideration against him as conduct under Section 8 of the Indian Evidence Act. In the present case, firstly, there is no material on the record to show why the deceased would have committed suicide. The accused was present at the time of the concurrence and if it was a case of suicide, there is no material brought on the record to show that the accused had taken any steps either to prevent her from so doing or get her medical aid immediately. As a normal human conduct on the death of a near kith and kin, one laments and would raise hue and cry and even take assistance and counsel from the neighbours and the accused had cordial relations with his immediate neighbours. Instead of doing so, he had slipped away and remained absconding for several days. This conduct certainly destroys presumption of innocence on his part.

[32] Evidence of conduct admissible under s. 8 may be explained as provided in s. 9 of the Evidence Act 1950 ("s. 9") which reads as follows:

> Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

[33] Illustration (c) to s. 9 reads as follows:

> A is accused of a crime.
>
> The fact that soon after the commission of the crime A absconded from his house is relevant under section 8 as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant as tending to explain the fact that he left home suddenly. A

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent. B

[34] In commenting on s. 9 *Sarkar on Evidence* 15th edn says at p 204:

S. 9 deals with facts necessary to explain or introduce relevant facts. Such facts are not of a causative nature, nor can they be strictly said to form part of the same transaction. Facts which explain or introduce a fact in issue though relevant for the purpose stated in the section, such facts do not form part of the *res gestae (ante*, s. 6) as they do not accompany the facts or transaction in issue. Facts which are explanatory or introductory of a relevant fact are often of considerable help in understanding the real nature of a transaction, in supplying missing links, in leading up to the main fact, or in establishing some connexion throwing light on the fact in issue. C D E

[35] The applicability of the two sections was considered in *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705 where the High Court said at pp 721-722:

I must add that evidence of conduct which allows inferences to be drawn, as in the two cases referred to, is admissible under s. 8 of the Evidence Act 1950. A typical example of such conduct is the absconding or flight of a person after the commission of an offence. But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v. State* [1996] Cri LJ 2201). Such conduct must be considered in the totality of the evidence adduced (see *Mansor bin Mohd Rashid*'s case). F G

For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question. As Lord Ackner said in *Chan Kwok Keung & Anor v. The Queen* [1990] 3 CLJ 386 (Rep); [1990] 1 CLJ 411 at p 413: H

It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence. Their Lordships' I

attention was invited by Mr Duckett QC on behalf of the crown to a number of Australian authorities which illustrate this proposition. But each case must depend on its own particular facts. In those cases to which their Lordships were referred, the flight of the accused had occurred within a short space of time of the offence being committed and in circumstances which clearly connected the accused with the offence.

In this case the appellants were found stowed away nearly ten months after the commission of the crime. The prosecution led no evidence to suggest that they had been in hiding for all or any part of this period. Indeed there was no evidence as to whether any and if so what efforts had been made by the police to find them and with what result. Leung, in his statement to the police after his arrest, gave them some information as to where the appellants were living or working, but no evidence was given as to whether these leads were followed up and if so with what result. It would in their Lordships' opinion be quite wrong for the jury to have taken it for granted that the appellants, during all or any part of this relatively lengthy period, had been evading capture for this offence. That was not the case as presented by the prosecution, and very appropriately the judge in his summing-up never suggested to the jury that they were entitled to make such an assumption.

In order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a nexus between the conduct of the accused, his flight or concealment and the offence in question. In this case the prosecution produced no evidence to establish that either of the appellants had been hiding away or otherwise behaving in an unusual manner in this period of nearly ten months. There was therefore no material which could have justified the jury inferring that the only reasonable explanation for the appellants stowing away on the ship from Hong Kong to Macau was that they were on the run, because they knew they might be arrested and charged with this murder. There could have been a variety of other reasons for their having stowed away nearly ten months after the murder.

Evidence of such conduct can be explained away by the accused as provided by s. 9 of the Evidence Act 1950 (see *Ling Ngan Liong v. PP* [1964] MLJ 20; *Choo Chang Teik & Anor v. PP* [1991] 1 CLJ 54 (Rep); [1991] 3 CLJ 2387; [1991] 3 MLJ 423). However, the onus is on the accused to explain his conduct. Thus in *Mansor bin Mohd Rashid*'s case, the Federal Court held that the intention of the accused

persons to flee, when considered in the light of the evidence adduced, justifiably necessitated some explanation from them. A failure to put forward any explanation of absconding after the occurrence of a crime is a point in favour of the prosecution (see *Parmeshwar v. R* AIR [1941] Orissa 517).

[36] The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v. Stephenson* [1904] 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage. However, the evidence admissible under the section must be confined to what is necessary for the purposes enumerated. Illustration (c) to s. 9 explains the operation of this principle. It provides that when A is accused of a crime the fact that soon after the commission of the crime he absconded from his house is relevant. But the fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left, however, are not relevant, except in so far as they are necessary to show that the business was sudden and urgent. If the explanation is accepted by the court then the inference arising from the conduct is rebutted. If it is not accepted or if the accused does not explain his conduct the inference remains unrebutted.

[282] Gopal Sri Ram JCA who delivered the judgment of the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393 summarised the steps to be undertaken by a trial court at the close of the prosecution case. He said as follows at p. 467 (CLJ); p. 400 B-F (MLJ):

> (i) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
>
> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then a *prima facie* case has not been made out and the accused should be acquitted;

[283] This court in applying the principle of "maximum or positive evaluation" of the prosecution case in the instant case must determine whether the prosecution has discharged its burden of showing that all the elements of the offence have been established by the prosecution. If after this court has conducted a maximum or positive evaluation of the prosecution case, this court considers that the prosecution has not established all the elements of the offence it will mean that the prosecution has not made out a *prima facie* case. If this is the outcome of the evaluation exercise carried out by this court, then this court ought not to call for the defence.

The Law On Circumstantial Evidence

[284] In the instant case there were numerous circumstances which were relied on by the prosecution and accepted by the court. The law on circumstantial evidence is trite.

[285] In *Magendran Mohan v. PP* [2011] 1 CLJ 805 the learned judge observed as follows at pp. 815 to 817:

> [9] The law on circumstantial evidence, in our opinion, is well settled. There are numerous decisions by the courts in our country as well as other jurisdictions which deal with circumstantial evidence.

[10] The mode of evaluating circumstantial evidence has been stated by the Supreme Court of India in *Hanumant Govind Nargundkar v. State of Madhya Pradesh* AIR [1952] SC 343 as follows:

> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

[11] Again, in *Chandmal & Anor v. State of Rajasthan* AIR [1970] SC 917, the Supreme Court of India in dealing with circumstantial evidence had this to say:

> It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (See also: *Ghambir v. State of Maharashtra* AIR [1982] SC 1157).

[12] In *Kishore Chand v. State* of H.P. AIR (SC) (1990) 2140, the Supreme Court of India was again confronted with the issue of circumstantial evidence and speaking through K Ramaswamy J it held that:

> The entire prosecution case rested on circumstantial evidence …
>
> The question, therefore, is whether the prosecution proved guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which

A the conclusion of the guilt is to be drawn should be fully and cogently established ... The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt .... In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established ...

... If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt ... There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused ...

... In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone.

[13] Back home in *Chan Chwen Kong v. PP* [1962] 1 LNS 22, Thomson CJ (as he then was) observed:

... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[14] In *Karam Singh v. PP* [1967] 1 LNS 65, HT Ong FJ (as he then was) noted:

... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ... (See also: *Muniandy & Anor v. PP* [1973] 1 LNS 92; [1973] 1 MLJ 179, *Kamis v. PP* [1974] 1 LNS 59; [1975] 1 MLJ 461, *Lim Foo Yong v. PP* [1976] 1 LNS 62; [1976] 2 MLJ 259 and *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] CLJ 101 (Rep); [1983] 2 CLJ 10; [1983] 2 MLJ 232.

[15] The Federal Court, in *Chang Kim Siong v. PP* [1967] 1 LNS 18 stated:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

[16] In *Jayaraman & Ors v. PP* [1981] 1 LNS 129; [1982] 2 MLJ 273 Syed Othman FJ (as he then was) has the following to say of a judge dealing with circumstantial evidence. At p. 280 of the report His Lordship opined:

> I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v. Director of Public Prosecution* where it was argued at page 279, before the House of Lords that in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused.

[17] To reiterate, there was no eye-witness version of the incident in this appeal and the prosecution entirely based its case on circumstantial evidence. Learned counsel for the appellant vigorously urged before us that the circumstances relied on by the prosecution have not been satisfactorily established and that in any event the circumstances said to be established against the appellant do not provide a complete chain to bring home the guilt against the appellant.

[18] It is appropriate at this juncture that we refer to the circumstances relied on by the prosecution and accepted by the trial court.

[286] Therefore, it is clear from the above authorities that in order for such evidence to operate against the accused, the prosecution bears a heavy onus as it must show that the circumstantial evidence points irresistibly to the accused's guilt (see *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285).

[287] In *PP lwn. Ho Sek Kong* [2006] 5 CLJ 49, Abdull Hamid Embong J (later JCA and now FCJ) observed as follows at p. 54:

> It is trite law that for such evidence to operate against the accused, the prosecution bears a heavy onus and that that evidence must irresistibly point to his guilt (see *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285). It is not the quantity of circumstantial evidence that the court looks at, rather the quality of that evidence.

The Law On Admissions

[288] The law on admissions is also trite.

[289] Before a confession can be accepted by the court it must be shown to have been voluntarily made. A statement which amounts to a confession is a statement which is an acknowledgment by the accused that he is guilty of the crime with which he is charged.

[290] Section 17(2) of the Evidence Act 1950 provides that a confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

[291] In *PP lwn. Ho Sek Kong* [2006] 5 CLJ 49, Abdull Hamid Embong J (later JCA and now FCJ) observed as follows at pp. 54 to 57:

> The prosecution's case rested solely on his confession and the circumstantial evidence supporting that confession in making out a *prima facie* case against the accused ...
>
> Central to the set of circumstances pointing to the guilt of the accused was his confession to SP4 when the latter confronted the situation upon recovery of the deceased's body. SP4 had maintained even under lengthy cross examination that the accused had admitted to killing his mother but had not intended to murder her (see p. 20 notes of evidence). This court had admitted this confession under s. 17(2) of the Evidence Act which states that:
>
> (2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.
>
> Under this section an inference can be made by the court that he had committed the crime because an inference can amount to a confession. In *Liew Kon Kiow v. PP* [1948] 1 LNS 137; [1948-49] MLJ Supp 150, it was stated by Spenser Wilkinson J that:

> In deciding what amounts to a confession and what does not, very little assistance can be derived from the English authorities because statements of any kind made to the police in England by accused persons are admissible provided they have not been obtained by improper means. The Indian authorities are of no assistance because sub-section (2) of our section 17 does not form part of the Indian Evidence Act, so that in India the word "confession" has been held to bear its ordinary everyday meaning of an admission of guilt.

The learned judge also went on to explain the phrase "suggesting the inference" by stating:

> It is quite clear from the words "or suggesting the inference" that something short of a full admission of guilt by the accused may yet be a "confession" within the definition. Whether, therefore, any particular statement amounts to a confession or not must depend upon the particular wording of the statement, the circumstances in which it is made and the charge to which the statement directly or indirectly refers.
>
> It seems to us that the words of the statement here in question, although innocent enough in themselves, when taken in conjunction with all the surrounding circumstances might be said to suggest the inference that the appellant committed the offence.

It could therefore, following the general rule on admissions, be proved against the accused as the maker of that statement as a direct acknowledgment of his guilt. (See *Sarkar on Evidence* 15th edn. Reprint 2003, at p. 423). According to Sarkar's commentary, a confession may be defined as an admission of the offence by a person charged with the offence, which does not contain anything self-exculpatory. The statement uttered by the accused to SP4 is not merely that he had a knowledge that an offence had been committed but, in my view, a direct acknowledgment of his guilt. ln other words, his statement can be classified as a plenary confession. Looking at that statement as a whole and without considering any other extrinsic facts, it suggested an inference that the accused had committed this murder, thus falling within the clear terms of s. 17(2) of the Evidence Act.

In *Lemanit v. PP* [1965] 1 LNS 89; [1965] 2 MLJ 26, the Federal Court adopted this passage of Lord Guest in *Anandagoda v. The Queen* [1962] 1 WLR 817, in accepting both plenary and non-plenary confessions as admissible under s. 17 of the Evidence Act. Lord Guest said:

> The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. In this connection their Lordships consider that the view expressed by Gratiaen J in *Seyadu v. King*, 'The test of whether an "admission" amounts to a "confession" within the meaning of section 17(2) must be decided by reference only to its own intrinsic terms' is correct. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time of which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even although the accused at the same time protests his innocence.

The confession was voluntarily made to SP4. There was no allegation that the accused had uttered it due to any inducement. In fact no serious challenge was raised that the confession was actually made by the accused. The confession was made, in my view, under a feeling of sheer remorse and manifested an acknowledgment that he had committed the act against the deceased. The fact that the accused said that he had not intended to do it, did not, in my considered view, make the confession exculpatory. Even if it was partly exculpatory, it may still be admitted under s. 17(2) of the Evidence Act. Augustine Paul in his book on *Evidence: Practice and Procedure*, 3rd edn made the following observation:

> In *Public Prosecutor v. Abdul Rashid & Ors* [1993] 3 SLR 794 (HC) Rubin JC (as he then was) said that what section 17(2) purports to import and what the *Anandagoda* decision purports to signify is that a confession need not be an unqualified expression of guilt and added at page 814

> Under our law, it is no more than a person's statement admitting to his involvement in the offence charged in any manner or form. Be it minor or major, direct or indirect, explicit or inferential and whether in exculpation or in earnest, irrespective of its object, so long as the statement connects the accused in some way with the offence charged, it would be deemed a confession under section 17(2).
>
> The test for what amounted to a confession would therefore be that the statement would relate the accused in some way to the offence for which he is charged.
>
> Besides the confession of the accused, there were also circumstantial evidence, which if considered together with that confession point irresistibly to the guilt of the accused in perpetrating this murder.

[292] After having subjected the testimonies of the prosecution's 40 witnesses to a maximum and positive evaluation, the court found that there was sufficient credible evidence from which the court was able to satisfy itself that pursuant to s. 180 of the CPC the prosecution had succeeded in proving on a *prima facie* basis all the necessary ingredients of the two counts of murder as set out in P2 pursuant to s. 300 and s. 301 of the Penal Code against the accused which would warrant the conviction of the accused unless rebutted or explained by the accused.

[293] The court was satisfied that the facts proved by the prosecution based on the circumstantial evidence and the two confessions which the accused made to PW13 and PW16 after the incident were consistent with the guilt of the accused and that the defence of the accused had to be called in order for the accused to give a plausible explanation which was consistent with his innocence.

[294] Upon applying the principles of law as enunciated in the above cases to the facts and circumstances of the instant case, the court found that the prosecution had proved the following ingredients on a *prima facie* basis:

(i) The two deceased persons were NSH and GYS, respectively;

(ii) It was the accused who had made the pomelo bomb and who had placed the pomelo bomb in front of the apartment.

(iii) The act of the accused in making the pomelo bomb and in placing it in front of the apartment was done with the intention of causing NSH's death; or it was done with the

A intention of causing such bodily injury as (a) the accused knew to be likely to cause NSH's death; or (b) was sufficient in the ordinary course of nature to cause NSH's death; or the accused caused NSH's death by doing an act known to him to be so imminently dangerous that it must in all probability
B cause (a) NSH's death, or (b) such bodily injury as is likely to cause NSH's death, the accused having no excuse for incurring the risk of causing such death or injury to NSH; and

(iv) The act of the accused in making the pomelo bomb and in
C placing it in front of the apartment was done with the intention of causing NSH's and PW9's deaths; or it was done with the knowledge that it was likely to cause NSH's and PW9's deaths but instead had caused the death of GYS whose death the accused neither intended nor knew himself
D to be likely to cause since the accused knew that GYS was not sharing the apartment with PW9 and NSH.

The Circumstantial Evidence Relied Upon By The Prosecution

[295] It is clear from the narration of the prosecution case as set
E out above that the circumstances relied upon by the prosecution from which an inference of guilt can be drawn against the accused that the two murders were premeditated, preplanned and were committed intentionally by the accused were numerous. The court found that the circumstantial evidence coupled with the two
F confessions made by the accused to PW16 and PW13 and relied upon by the prosecution had passed the three tests laid down in *Hanumant Govind Nargundkar v. State of Madhya Pradesh* AIR 1952 SC 343, followed in *Chandmal & Anor v. State of Rajasthan* AIR 1970 SC 917, and cited with approval by the Federal Court in
G *Magendran Mohan v. PP*, *supra*.

[296] Firstly, the court found that the circumstances were cogently and firmly established. Secondly, the court found that the circumstances were of a definite tendency unerringly pointing
H towards the guilt of the accused. Thirdly, the court found that the circumstances, taken cumulatively, formed a chain so complete that there is no escape from the conclusion that within all human probability the crimes were committed by the accused and no one else. In other words, the court found that the circumstances were
I incapable of explanation on any reasonable hypothesis save that of the accused's guilt.

[297] Each piece of circumstantial evidence coupled with the two confessions was like a strand of evidence which when wound together became a rope strong enough to hang the accused (*Chan Chwen Kong v. PP* [1962] 1 LNS 22). A

[298] The circumstantial evidence coupled with the two confessions was inconsistent with any other hypothesis except the accused's guilt (see *Karam Singh v. PP* [1967] 1 LNS 18). B

[299] The circumstantial evidence pointed irresistibly to the conclusion that the accused was guilty of the crimes with which he was charged (see *Chang Kim Siong v. PP* [1981] 1 LNS 129). C

[300] The circumstantial evidence has been satisfactorily established and when considered together with the two confessions not only provided a complete chain to bring home the guilt of the accused but also excluded every reasonable explanation other than the guilt of the accused for the two counts of murder (see *Jayaraman & Ors v. PP*, *supra*). D

[301] The circumstantial evidence is as follows:

(a) About three months prior to the incident, after the accused had suffered losses in his gambling activities at the internet café, the accused angrily told his friend, namely, Encik Mohamad Zulkarnain bin Shariff (PW17), that he wished to set fire to the internet café. E F

(b) About two months later, ie, one month before the incident, the accused repeated his wish to set fire to the internet café to PW17 but PW17 advised him not to do it and to think of his wife and children. G

(c) About the same time, ie, one month before the incident, the accused also told another friend, namely, Encik Abdul Rahman bin Abdul (PW11) that he wished to bomb PW9 and NSH and he repeated the same wish to PW11 about one week prior to the date of the incident. H

(d) About five weeks before the incident, the accused had asked his former employee, namely, Encik Sharif bin Mat Hanapiah (PW18) to purchase some "mercun bola" for him.

(e) About a week later, ie, one month prior to the incident, PW18 handed over to the accused two packets of "mercun bola". I

A (f) On the night before the incident, ie, 28 August 2010, at 8pm, NSH informed PW9 that the accused had asked her for a loan of RM20,000 but when she told him she had no money, the accused said "Kalau tak beri pinjam besok kamu tengoklah".

B (g) On the night before the incident on 28 August 2010, at 8.39pm, the accused purchased two pomelos and a screwdriver (the "three items") from Puan Siti Safinaz binti Othman (PW26), the cashier who was in-charge of the C counter, ie, counter 9, at the Giant Supermarket in Taman Connaught.

(h) Upon viewing the second CCTV recording which was played in court, PW26 was able to remember the purchase of the three items by the male Malay whose image was captured by D the CCTV camera. She identified (P4 (33) and P4 (34)) as the two photographs of the two pomelos which were purchased by the male Malay. She also identified the duplicate of the receipt for the purchase (P30) which was printed out by Encik Mohamad Hazlin bin Hamzah (PW27), the chief E cashier, upon her request and handed over to PW22 by PW26 on 1 September 2010. Her evidence is corroborated by PW27's evidence, the receipt and the second CCTV recording.

F (i) At 3am, on the date of the incident, PW12 saw the accused carrying a blue coloured squarish shaped plastic bag and walking towards the direction of the lifts on the ground floor of Block 2, Apartment Desa Tun Razak. According to PW12 the accused held the bag by holding onto its two handles G which were made of string. PW12's evidence was corroborated by the first CCTV recording which showed the accused while he was carrying such a bag entering one of the two lifts on the ground floor, exiting the lift on the 12th floor, walking out of the lift towards the right, entering the lift a H short while later empty handed, exiting the lift on the ground floor and leaving the building of Block 2.

(j) At 8am, on the date of the incident, NSH woke PW9 up from his sleep, led him outside the apartment which they had jointly I rented and showed to him a blue coloured plastic bag with two pomelos on top of a box inside the bag which was placed in front of the main wooden door of the apartment.

(k) They then went downstairs to the internet café to look for Ah Ti (GYS) in order to ask him whether he was the one who had given her the two pomelos inside the bag.

(l) Ah Ti told them that he did not place the bag with the pomelos there.

(m) A short while later, PW9, NSH and Ah Ti (GYS) went upstairs to the 12th floor to the place where the bag was placed earlier.

(n) PW9 saw that the bag with the two pomelos was still there at the same spot.

(o) PW9 saw Ah Ti (GYS) lifting up the two pomelos.

(p) The next thing which PW9 saw was fire coming out from the bag. This was followed by a very loud explosion. PW9 then saw the clothes of both NSH and GYS on fire and he heard them screaming out in pain. He then saw both NSH and GYS collapsing onto the floor.

(q) Insp Lew Kheng Joe (PW38), the initial IO who was directed by his superior, the acting officer-in-charge of the Cheras District, to go to the scene to investigate the incident saw broken pieces of glass, two pomelos, broken pieces of "mercun bola" and other items at the scene of the incident.

(r) On the morning after the incident, ie, on 30 August 2010, the accused told his friend, namely, Encik Mohd Nordin (PW13) that he was chased out of his house by his wife and he asked PW13 for permission to put up with PW13 temporarily in PW13's office.

(s) Since his office did not have any water supply, PW13 called his brother, Suhailee to ask him whether the accused could stay temporarily in P16's house.

(t) PW13 also called PW16 to ask him whether the accused could stay in P16's house, temporarily.

(u) PW16 agreed to allow the accused to stay temporarily with him in the house which was rented by Suhailee and which he (PW16) was sharing with Badeli.

(v) When PW16 arrived at the house after work, PW16 saw that the accused was already in the house and that the accused had brought along his laptop computer with him.

(w) During his stay with PW16, PW16 noticed that the accused would be looking at and playing with his laptop and one day the accused confided in P16 that he (the accused) was the one who was responsible for the explosion at the apartment which was reported in the newspapers in which his (the accused's) good friend (NSH) was hurt and that he (the accused) had made the bomb using PVC, petrol and matches.

(x) After PW13 was informed by Suhailee that it was reported in the newspapers that the police were looking for the accused in connection with the incident, PW13 confronted the accused who admitted to PW13 that he had done it and when he was asked by PW13 to surrender (to the police) the accused said that he would surrender after he had collected payment of a sum of RM18,000 from his client.

(y) Three weeks later, on 24 September 2010, at 5.55am, while the accused was still staying in PW16's house, the three of them, ie, the accused, Badeli and PW16 were arrested by PW36.

Whether The Accused Was The Person Who Had Purchased The Two Pomelos At The Giant Supermarket On The Eve Of The Incident And Who Had, Some Seven Hours Later, Placed The Bag Containing The Pomelo Bomb In Front Of The Apartment Which Caused The Fire And Explosion And The Deaths Of NSH and GYS?

[302] The court was satisfied that the question ought to be answered in the affirmative. The reasons are as follows:

(1) The court was satisfied that the person in the second CCTV recording is the accused and that the accused was the person who had placed the bag containing the pomelo bomb in front of the apartment immediately after he had walked out of the lift on the 12th floor towards the right side of the lift and before he returned empty handed to the lift shortly after that based on the following factors:

(a) The court viewed the CCTV recording of Block 2 of the Apartment Desa Tun Razak (the "first CCTV recording") which shows a person resembling the

accused in terms of his physical built and his facial features approaching the lifts with a blue coloured bag. The court saw that the bag appeared to be heavy as the bag was visibly drooping down.

(b) In my judgment, the identification of the accused as the person named "Khayry" in the first CCTV recording by PW12 and PW9 as corroborated by PW40's sworn oral testimony and the reports of his two identification parades (P124 for PW12 and P125 for PW9) is good. The reasons are as follows:

(i) Firstly, the accused was known to both PW12 and PW9 prior to the incident;

(ii) Secondly, PW40 had testified on oath that the other participants were Malays like the accused, aged about 40 years old like the accused's age and were of similar physical built;

(iii) Thirdly, according to PW40, both PW9 and P12 had no difficulty in identifying the accused, as the person who was suspected of having been involved in the incident on 29 August 2010 at the Apartment Desa Tun Razak; and

(iv) Fourthly, the two identification parades which were held by PW40, upon the direction of PW22, on 30 September 2010, at about 4pm, ie, six days after the arrest of the accused and about a month after the incident, was held within a reasonable time after the incident as there was a good reason why they could not be held earlier because the accused had fled and gone into hiding in PW16's house after the incident.

(2) The court also viewed the CCTV recording at counter 9 of the Giant Supermarket (the "second CCTV recording") which shows a person resembling the accused in terms of his physical built although his face could not be fully seen making payment at counter 9 for his purchase of the three items, ie, two pomelos and a screwdriver.

(3) The court took into account the evidence of PW36 that it was the accused who had led PW36 to the Giant Supermarket after his arrest from where PW22 later obtained the receipt for the accused's purchase of the three items from PW26.

(4) The court observed that the man in the second CCTV recording resembled the accused in terms of his height and physical built.

(5) The court also took into account PW38's testimony that he could see a greenish coloured round shaped object contained in a white plastic inside the blue coloured bag which a male Malay, who resembled the accused was carrying, when his images were captured by the first CCTV recording at the Apartment Desa Tun Razak as he entered the lift on the ground floor, exited the lift at the 12th floor but re-entered the lift empty-handed.

(6) The court also considered the testimony of PW9, the only eyewitness to the fire and explosion that he saw the same bag, the images of which were captured in the first CCTV recording, outside his front door with the two pomelos sitting exposed on top of a box inside the bag and when Ah Ti lifted up the two pomelos PW9 saw fire and PW9 also heard the sound of a loud explosion.

(7) The court also considered the testimony of PW33 that he had retrieved two pomelos from the scene of the incident and the court found that they looked similar in appearance to the two pomelos which were purchased by the accused from PW26 at counter 9 of the Giant Supermarket at 8.39pm on the night before the incident.

(8) The court took into consideration the accused's desire to bomb the towkay of the internet café and Ah Soh and to set fire to Ah Soh and the internet café which the accused openly expressed to PW11 and PW17, respectively, prior to the incident.

(9) The court also took into consideration the accused's two confessions to PW16 and PW13 after the incident because the court was satisfied that they were made voluntarily by the accused without any inducement or threat or promise and which implicated the accused as the only person who

was involved in the making of the pomelo bomb and in leaving it in front of the apartment in the blue coloured plastic bag.

(10) The court was of the view that the remorseful behaviour of the accused after the incident which was testified to by PW16, ie, weeping, regretting what he described as his silly act of making the pomelo bomb and his silly act in placing it in front of the apartment and saying that he was mentally unstable when he did those acts did not exculpate the accused from the two counts of murder.

(11) This is because the prosecution has positively established that the accused had the requisite *mens rea* to commit the crimes as prior to and at the time of the commission of the two offences the accused had harboured anger and ill-will towards PW9 and NSH and the internet café. He also had a motive to kill PW9 and NSH and set fire to the internet café and his desire was to see them dead and to prevent them from operating the internet café.

(12) His motive was two-pronged. Firstly, it was to take revenge on them for his substantial gambling losses. Secondly, it was to protect other Malays so that they would not gamble and lose their money at the internet café. However, it is very tragic because the accused clearly believed that his acts in making the pomelo bomb and in placing it in front of the apartment in order to kill NSH and PW9 were justified.

(13) PW9 is extremely fortunate because he was not killed and only suffered some minor injuries to his hands. NSH and GYS were not that fortunate as both died as a result of their serious injuries.

[303] I wish to state that I have completely excluded and dismissed from my mind the evidence of PW22 concerning the simulation of the pomelo bomb by Corp Katiman. The reasons are as follows:

(1) Based on PW22's evidence the accused was asked to participate in the simulation exercise but there was no evidence that the accused had participated in the simulation exercise;

A (2) Furthermore, the prosecution did not request for a *voire dire* to be held to determine the admissibility of the evidence concerning the simulation exercise; and

(3) The accused was alleged to have said certain things or made
B certain statements to the police during the alleged simulation exercise which may be construed as a confession by the accused and it is trite law that without a successful such evidence is clearly inadmissible.

C **[304]** Therefore, I ruled PW22's evidence inadmissible. I, accordingly, directed the evidence of PW22 and the other prosecution witnesses on this matter to be expunged from the notes of proceedings.

D **[305]** In my judgment, based on the same reasons, Corp Katiman was not a material witness and hence the failure of the prosecution to call him as a prosecution witness did not create a material gap in the prosecution case.

E **[306]** Therefore, no adverse inference ought to be drawn under s. 114(g) of the Evidence Act 1950 against the prosecution for its failure to call Corp Katiman as a prosecution witness.

F **[307]** In my judgment, the failure of PW22 to record statements from the firemen and to obtain the report of the fire department as to the cause of the fire and explosion coupled with the failure of the prosecution to call the firemen as witnesses to testify for the prosecution and the failure of the prosecution to call the doctors who treated the two deceased persons prior to their death other than PW14 and PW23 did not create any material gap in the prosecution case.

G

[308] This is because based on PW9's testimony and GYS's dying declaration made while GYS was in HUKM, as corroborated by the physical evidence recovered from the scene, the testimonies of the forensic police, the bomb expert, the government chemist
H and the nature of the injuries suffered by NSH and GYS which were confirmed by the two doctors who attended to them and the two forensic pathologists who conducted the post-mortem examination on them, the causes of the fire and explosion were not in doubt and had been satisfactorily established by the
I prosecution. It was patently obvious from the testimonies of PW14 and PW23, the two doctors who examined and treated the two deceased persons upon their admission into the HUKM and the

two forensic pathologists that the two deceased persons had died as a result of the injuries which were caused by the fire and explosion and that they could not have been saved because the injuries they suffered were extremely serious.

[309] Hence the court did not draw an adverse inference against the prosecution for its failure to call the firemen as witnesses or to obtain and produce a report from the fire department as to the causes of the fire and explosion or to call the doctors other than PW14 and PW23 who had treated the two deceased persons prior to their deaths as witnesses.

The Three Witnesses Of The Defence

[310] The defence called three witnesses.

[311] As stated earlier, the first witness is the accused, namely, Mohd Khayry bin Ismail (DW1). The second witness is Encik Abdul Aziz bin Omar (DW2) who was one of the 33 witnesses offered to the defence at the close of the prosecution case; and the third witness is Encik Zulkifli bin Yeop (DW3).

The Defence Of The Accused

[312] The defence of the accused was very lengthy and elaborate. It had many details.

[313] In his defence, the accused has:

(1) Denied that prior to the incident he had angrily told PW11 of his desire to bomb the towkay of the internet café, ie, PW9 and Ah Soh, ie, NSH. He has also denied that prior to the incident, he had angrily told PW17 of his desire to set fire to Ah Soh, ie, NSH, and the internet café on two occasions while they were drinking in Abang Zul's shop in Bandar Tun Razak on account of his gambling losses;

(2) Said that it was another friend who had, in the presence of Abang Zul, ie, one Encik Zulkarnain, and his son by the name of Bakar, said "kau bakarlah kedai ini", in Malay which means "you set fire to the shop" in English if a patron wins the jackpot at the internet café and the towkay does not pay the winnings to the patron. However, when asked who

A was the person who had said those words, he said he could not remember. He insisted that those words were also uttered by many people at Encik Zulkarnain's shop but not by him;

B (3) Admitted that he was the man whose image was captured in the first CCTV recording but:

(a) Denied that he was the one who had made the pomelo bomb and that he had placed it inside the blue bag (which was first seen by NSH and later by PW9 and NSH and before the pomelo bomb exploded, by NSH, PW9 and GYS);

(b) Denied that inside the blue bag which he had placed outside the apartment after walking out of the lift on the 12th floor was the pomelo bomb which he had made;

(c) Said that inside the bag were the two pomelos and some pickles which he had bought from the Giant Supermarket Taman Connaught as gifts for NSH (in order to thank her) because when his father passed away on the eve of the incident, NSH had given him cash of RM300 and she had also given him three hampers for Hari Raya, ie, the Malay New Year, which was three weeks away from the eve of the incident;

(d) Said that he had a good relationship with NSH whom he has known for about five to six years prior to the incident and had no reason or intention to kill her; and

(e) That he did not have any misunderstanding with GYS and that he did not have any reason for wanting to kill GYS;

(4) Denied that he had fled to PW16's house after the incident in order to avoid arrest because he was responsible for the incident. He insisted that he was forced to stay temporarily with PW16 because he was chased out of his house by his wife who had suspected him of having an affair but insisted that he was in fact not having an affair with another woman;

(5) Denied that he had confessed to PW13 and P16 that he was the one who was responsible for the fire and explosion at the apartment. He said that it was PW13 who had forced

him to admit that he was the culprit and PW13 had also asked him to surrender to the police even though he told PW13 he was not the culprit. He told PW13 that he would only surrender to the police to enable the police to investigate and find the real culprit since he did not do it. He also told PW13 that he would not surrender himself to the police until he had raised sufficient money to engage a lawyer to defend him and only after he had sorted out his affairs concerning his work;

(6) Said that prior to the incident he had on previous occasions given fruits to NSH after his return from his outstation trips from Penang such as pomelos;

(7) Admitted that on the eve of the incident he had approached NSH to ask her for a loan because he needed money for his expenses for the Hari Raya which was three weeks away but denied that he had asked her for a loan of RM20,000 and insisted that it was NSH who had asked him whether a loan of RM20,000 was sufficient. He denied vehemently that when NSH refused to give him the loan, he had warned NSH using the words "Kalau tak beri besok kamu tengoklah";

(8) Admitted that he had obtained two "kampit" of "mercun bola" in Malay which means two "bags woven from Mengkuang leaves, etc" of "ball firecrackers" in English through PW18 but said that they were intended to be given to his friend by the name of Zulyop, ie, Encik Zulkifli bin Yeop (DW3);

(9) Said that he had been to DW3's orchard in Kuala Lumpur and DW3 had complained to him about the loss of his fruits to monkeys and also about the damage to his plants by wild boars. He also said that soon after having received the two "kampit" of "mercun bola" from PW18 he had given them to DW3 in the presence of Encik Abdul Aziz bin Omar (DW2) so that DW3 could use them to scare away the monkeys and the wild boars in his orchard;

(10) Said that he is married with six children and the name of his wife is Puan Murni binti Md Aris;

(11) Said that he did not own a Toyota Hilux when he was cross-examined by the learned DPP and it was suggested to him that he had used his Toyota Hilux to flee from the

A scene of the incident but later returned to his home and used the Proton Saga car which belonged to his father-in-law in order to avoid detection by the police;

(12) Said that he had his own telecommunications company by
B the name of Memox Network Sdn Bhd which is registered with Telekom Malaysia Bhd. Prior to his arrest he was given a one year sub-contract for the installation of broadband networking in Penang involving 270 sites and that he undertook work throughout Malaysia only for Telekom
C Malaysia Sdn Bhd. Prior to the date that he testified in court he had many staff and workers some of whom were permanent workers while others were freelance workers. He did not have a permanent office as he could work from his home since his work which involved communication systems
D did not require an office space and he could send his reports to the management *via* email from his computer. He also said that he earned an average monthly income of RM15,000 from his sub-contract work with the Telekom Malaysia Berhad;

E
(13) When asked why he was arrested by the police at p. 524, line 16 of the notes of evidence, said that it was because, based on his understanding from reading the newspapers, he was suspected of having caused the explosion which had
F resulted in the deaths of two employees of the internet café, that he did not believe that the incident had happened, that he was at a loss as to what to do, that he took some time to think about it, that he then decided to let the police conduct their investigations so that the real culprit could be
G apprehended because he did not do it; ie, cause the explosion;

(14) Initially said at p. 524, line 30 of the notes of evidence that he had bought the "buah dan jeruk", ie, fruits and pickles, from Penang and that he was taking it to the apartment to
H give to his "Kakak", ie, NSH. Subsequently, he changed his testimony and said that he had bought the "buah limau", ie, the pomelos, from the Giant Supermarket before going to the apartment. He also said he bought pickles but did not say from where he had bought them. He then took the
I pomelos and the pickles to the internet café with the intention of giving them to NSH. However, on his arrival at the internet café he did not see NSH. While he was waiting

for NSH to show up at the internet café, he played some games on the computer. After a long time, NSH still did not show up at the internet café and as it was late, he wished to return home. So he took the bag containing the pomelos and the pickles upstairs to the apartment and he left them outside the apartment. He then went home;

(15) Denied that he had suffered substantial losses as a result of his gambling activities at the internet café. He also denied that he owed NSH money because of his gambling activities at the internet café. He insisted that he merely gambled at the internet café to pass time and was not concerned about winning or losing because he enjoyed playing games on the computer. At other times, he would visit NSH and PW9 at the apartment and chit chat with NSH and PW9;

(16) Said that one evening NSH gave him RM300 out of her sympathy to him upon the demise of his father and three hampers for Hari Raya. The accused's testimony at p. 529, line 11 to line 25 of the notes of evidence, is reproduced below:

S: Kamu minta pinjam daripada si mati beberapa ribu ringgit. Jelaskan.

J: Satu petang, saya balik kerja. Kakak telefon suruh datang jumpa di kedai, lebih kurang petang. Saya singgah sekejap. Kakak tengah minum dengan Mr. Lim. Masa itu bulan puasa. Saya tidak minum. Ayah saya baru meninggal. Dia tahu. Kakak bagi duit RM300 untuk simpati sebab ayah saya baru meninggal. Dia bagi saya 3 hamper. Masa itu lagi 3 minggu hendak raya. Tidak lama lepas itu, saya balik untuk buka puasa. Semasa kakak hantar hamper, dia bagi 3 hamper. Dalam perjalanan, saya ada cakap kat kakak "Kakak saya dah nak dekat hari raya. Claim saya belum keluar. Kalau kakak boleh pinjamkan duit, saya nak pakai dulu duit". Kakak kata "Duit takde lagi". "Takpelah, kalau takde, esok esok pun tak ape. Kalau kakak ada duit, kakak bagi lah kat saya".

S: Kamu ada kata hendak pinjam sebab raya, jumlahnya ada cakap?

J: Jumlah saya tidak kata. Tapi kakak tanya saya balik, RM20,000 cukup ke? Memang kita perlukan banyak duit. Saya pentingkan keperluan. Saya kata cukup, tapi dia tidak ada duit lagi sekarang."

(17) Said he did not know GYS at all, hence implying that he had no intention or reason or motive to kill GYS or to cause him such injuries as would in the ordinary course of events cause GYS's death;

(18) Said the first time he learnt about the incident was when he was confronted by PW13 one night on a date he could not remember (while he was still staying with PW16). He was playing with his laptop computer when PW13 came to the house. PW13 pulled him by the hand into the bedroom, showed him the newspaper and told him that his name was implicated in the incident. The accused had a shock. PW13 asked him to read the newspaper. Upon reading the newspaper, he was shocked that his name was mentioned as the suspect and that the police were looking for him because of the bombing incident which led to the deaths of two persons. He had no inkling of the incident prior to being confronted and shown the newspaper by PW13;

(19) Said that PW13 then accused him of lying and said that he had done it. So both of them ended up having an argument that night. In order to appease PW13, the accused said he was compelled to admit to PW13 that he had done it. This is what he was asked and what he answered at p. 532, line 1 to line 17 of the notes of evidence:

> puaskan hati dia. Dia pun tidak paksa saya. Kalau tidak, dia ajak saya terus untuk serah diri. Saya terpaksa mengaku untuk puaskan hati dia.
>
> S: Apa yang kamu maksudkan nak puaskan hati dia "Kalau aku buat, aku bertanggungjawab?
>
> J: Masa itu saya tertekan. Sebagai kawan yang sudah lama, dia tidak seharusnya tidak percaya saya. Saya tidak ada menipu dia. Kejadian itu adalah kejadian tiba-tiba terjadi setelah saya berpindah ke rumah kawan dia, tinggal di rumah kawan dia. Dia tuduh saya. Sebelum ini saya tidak tahu apa-apa kejadian itu. Dia paksa saya, untuk puaskan hati dia, saya cakap begitu. Saya cakap "Biar polis buat kerja, bagi aku masa". Saya memang tidak faham. Saya perlukan masa untuk selesaikan kerja saya. Untuk dapatkan peguam, nak buat claim yang tak buat lagi. Kalau saya serah diri, saya tidak dapat menyiapkan kerja itu. Pekerja tidak dapat duit. Tiada orang lain yang boleh siapkan kerja saya. Saya kata "bagilah masa kat aku". Tidak perlu serah diri awal.

(20) When asked by his learned counsel concerning his confession to PW16 that he had caused the explosion, denied having made the confession to PW16 because while he was staying with PW16 he hardly spoke to PW16. He also denied that during his stay with PW16, PW16 had chit-chatted with him and that PW16 had asked him whether it was true that the name, ie, Khayry, which was reported in the newspapers was him because while he was staying with PW16, Suhailee and PW13 would call him by the name of Ery (not Khayry);

(21) Said that in fact, PW16 did not even know his name and the same was true for Badeli and that it was only after their arrest and while the three of them were detained in the police lock-up that he and PW16 had chit chatted with each other and it was only then that PW16 came to know the accused's name. He explained that this was so because P16 would be working during the daytime and he would only see PW16 at night upon PW16's return from work but PW16 would go out again and he would be left alone in the house. At times, he would go out alone to the shop to have a drink all by himself;

(22) Explained that his initial intention was to stay only for a short period of time in PW16's house as he had brought with him only one or two changes of clothes and his computer. He explained that he did not know about the incident until he was confronted about it by PW13 because there was no TV or radio or newspaper in the house and neither PW16 nor Badeli had asked him about the incident. He added that the house did not even have facilities for cooking;

(23) Said that his stay with PW16 turned out to be much longer, ie, about 24 days, upon his arrest by the police based on his calculation, because after PW13 confronted him about his suspected involvement in the incident, he felt burdened by it and he did not know what to do. He had intended to surrender himself to the police but at the same time he was worried because he had not raised sufficient money to engage a lawyer. Hence, he became confused. So he called his wife to inform her about what was reported in the newspapers concerning his suspected involvement in the incident. His wife told him that she had forgiven him, asked

him to go home as the Hari Raya was approaching and also asked him to surrender himself to the police but he could not do that because the police would definitely arrest him;

(24) Said since he was not guilty and he was not ready to surrender himself to the police, he continued to stay with PW16 because he was still trying to find a lawyer (to represent him) when he was arrested by the police in a police raid one morning while he was still sleeping and the police also took his mobile phone and his laptop computer;

(25) Admitted that he obtained the "mercun bola" from PW18 but it was in the presence of Abdul Aziz (DW2), who had driven him to meet PW18 because his driving licence had expired, that he paid PW18 RM40 for them but that he had, subsequently, given them to Zulyop (DW3), his friend and former employee, in order to scare away the monkeys which were eating the fruits and the wild boars which were damaging the plants in DW3's orchard as the orchard was located in the interior of Kuala Lumpur. He identified Encik Zulkifli bin Yeop (DW3) as Zulyop. He insisted that he had asked PW18 to get the smallest sized "mercun bola" since it was easier to use than the bigger sized ones. He had also handed them over to DW3 the very next day in the presence of DW2;

(26) Insisted that there was an interval of three months between his handing over of the "mercun bola" to DW3 and the incident and that he could remember the occasion because, subsequently, he had taken his children to Penang for a holiday. He admitted that there were a lot of "mercun bola" in the "two kampit" which he had given to DW3 because he had held them in his hands before handing them over to DW3;

(27) Denied that he knew there was black powder inside the "mercun bola" at the time he handed them over to DW3 but he admitted that ever since he was a child playing with firecrackers and fireworks he knew that it is the substance inside them which he knew as "blerang", ie, black powder, which causes them to explode;

(28) Admitted that he had shown the police the counter in the Giant Supermarket where he had purchased the two pomelos and the screwdriver;

(29) Also admitted that the police had seized various items from him and that these were seized at PW16's house, from the Proton Saga car which was parked in the Sungai Buloh Hospital and also from his house in Bandar Tun Razak but he insisted that the items were items which were used by him in the ordinary course of his work and that some of the items were bought by him from a hardware shop in Pudu;

(30) Said he had previously sent fruit pickles and pomelos and sometimes other fruits to NSH about ten times during the one year when he had a contract do the installation of the broadband networking in Penang and he knew that NSH liked them, in particular, the pomelos which he would purchase from Tambun and she would use the pomelos to pray with. He would send them to her, either to the internet café or to the apartment and that PW9 knew about this. His testimony to this effect at p. 542, line 14 to p. 543, line 13 of the notes of evidence is reproduced as follows:

> Kamu mengaku jam 3.00 pagi, 29.8.2010, kamu didakwa dilihat menghantar beg warna biru ke sebuah rumah di tingkat 12. Kamu memang menghantar limau dah jeruk. Ada lain barang yang kamu hantar dalam beg ini? Jelaskan.
>
> J: Pada pukul lebih kurang 3.00 pagi, saya memang ada hantar beg. Saya naik lif dari bawah ke tingkat 12, bawa beg menghala ke rumah kakak saya. Saya bawa Cuma buah limau yang saya beli di Giant dan pelbagai jenis jeruk yang saya beli, hantar ke rumah kakak. Itu sahaja. Jeruk dan buah sahaja. Saya tidak ada hantar benda lain. Tidak ada benda lain. Saya memang tidak mengetahui ada benda lain. Sebab yang saya tahu, saya hantar jeruk dan buah limau sahaja. Tidak ada barang lain yang saya hantar. Pergi ke sana dengan ikhlas hati menghantar buah dan jeruk itu sebab kakak saya bagi hamper dan duit kepada saya atas rasa terima kasih, saya berusaha dapatkan buah limau sebab buah limau memang kakak suka. Kerana kakak suka, saya hantar terus ke rumah. Sebab awal itu kakak tidak ada dikedai. Saya terus ke rumah dan hantar.
>
> S: Adakah ini kali pertama kamu memberi buah buahan kepada si mati?
>
> J: Saya memang selalu beli buah jeruk dan limau dan buah lain kadang-kadang. Projek di Penang setahun, mula dari Januari 2010. Setiap kali balik dari Penang, saya akan beli

jeruk dan kadang-kadang buah limau. Selalunya beli limau, singgah di Tambun dan bagi kepada kakak. Setiap kali. Kalau tak salah, lebih 10 kali. Saya balik sebulan, kadang-kadang 2 minggu sekali. Saya memang selalu beli. Kakak memang suka. Kadang-kadang bawa limau untuk sembahyang. Saya beli limau dan jeruk.

S: Adakah sesiapa tahu tentang bila kamu hantar kepada kakak?

J: Ramai yang tahu. Sebab kadang-kadang saya bawa masuk kedai dahulu, kadang-kadang saya bagi di luar kedai. Hantar di rumah pun ada. Yang selalu ada ialah Zulkarnain dan Aziz. Mereka ikut kerja di Penang. Orang kedai pun tahu juga, Mr. Lim pun tahu juga.

(31) When he was cross-examined by the learned DPP, denied that he had left his house on 29 August 2010, ie, the day of the incident, instead of on 30 August 2010, ie, a day after the incident, as claimed by him in his examination-in-chief;

(32) Denied that he could have left the pomelos in the white plastic bag without putting them inside the blue bag;

(33) Also denied that he had used the blue bag in order to conceal the box in which he had placed the "mercun bola" and the other items which had caused the explosion;

(34) Admitted that he had left the bag and the contents, ie, the pickles and the two pomelos, as they were his gifts to NSH to thank her for her gift of cash of RM300 and three hampers but he could not explain why the police did not find any pickles or remnants of pickles at the scene of the incident;

(35) Denied that during the interval of time of about an hour, ie, from 2am when he left the internet café to 3.09am when his image was captured by the CCTV entering the lift with the blue bag, he had gone to his car to prepare the pomelo bomb to be placed in front of the apartment. He also explained that he left the internet café at 3am and not 2am (as testified to by PW12) and that there was no time interval of about one hour for him to make the pomelo bomb and place it inside the blue bag before carrying it at 3.09am to the apartment. He insisted that had the prosecution

tendered the CCTV recording inside the internet café, it would confirm his testimony because he was the one who had installed the CCTV recording system upon the request and instructions of NSH;

(36) Relied on the report by the police that the police did not find any record in his laptop computer which showed that he had accessed any website from which he had learnt how to make the pomelo bomb which was used in the incident;

(37) In his re-examination, said that it was strange that the police did not find any pickles or any remnants of pickles at the scene of the incident or any remnants of the blue bag because he had definitely placed the pickles inside the bag before he carried them upstairs to the apartment and left them outside the apartment;

(38) Upon the application of learned defence counsel which was allowed by the court in spite of the objection of the learned DPP, tendered some documents, ie, his bank statements and some local orders or purchase orders showing payments made to him of small amounts of money for work done. He admitted that there was no document to show that the price or value of the sub-contract for the works in Penang for 270 sites which he had successfully tendered for was RM700,000 or that his sub-contract works extended throughout the whole of Malaysia but he insisted that it was kept in his house by his wife;

(39) Admitted that his bank statements did not show that he was earning a monthly income of RM15,000 a month. Nevertheless, the accused explained that he did not place all his monthly income of RM15,000 in his bank account because he preferred to place his income in investments which were more profitable than saving them in the bank but he did not produce any documents to support his explanation except to say that all the financial documents were either kept by his wife who is a co-director of his company and that all correspondences went to his mother-in-law's house because when the company was incorporated he did not have his own house and he and his wife were staying with his mother-in-law in her house; and

(40) Said that the various items recovered by and seized from the three places by the police and his purchase of the screwdriver from the Giant Supermarket was necessary and essential as part of his tools in carrying out the installation of the wiring in the course of his work as a telecommunications contractor. He explained as follows:

(a) He uses the small saw with the yellow handle to make a cut in the ceiling to allow the wire to go through the ceiling;

(b) He uses the electrical casing to install the cable wiring in dry areas;

(c) He uses the PVC pipe to install the cable wiring in wet areas;

(d) He uses the elbows to divert the flow of the water for the purpose of the installation of the cable wiring; and

(e) He uses the screwdriver in the course of his work.

DW2's Testimony

[314] DW2 in his testimony said as follows in his examination-in-chief:

(1) He worked for the accused from 2000 to 2009;

(2) In the year 2009, he was working for the accused in Penang as the accused had a one year contract to install the broadband network in Penang;

(3) He stopped working for the accused when the accused was charged in connection with the bombing incident;

(4) He knows PW18 who was also working for the accused in Penang;

(5) One night while he was at a fishing pond, he saw PW18 handing over some "mercun bola" to the accused;

(6) Although he was at a distance of about 20 feet away from both of them he could see this because there were lights at the fishing pond and when he and the accused were on their way back to Kuala Lumpur, the accused showed them to him and told him that they were meant for Zulyop (DW3);

(7) He saw that there were about two packets of them and they were small in size, ie, as big as his thumb;

(8) He knows DW3 because DW3 works for Telekom Malaysia Berhad as the site supervisor for the site on which he carries out the installation works for the broadband network; and

(9) The next morning he saw the accused handing over them over to DW8 at the Seberang Jaya Telekom Malaysia.

[315] When he was cross-examined by Encik Ahmad Akram, the learned DPP, he said as follows:

(1) He did not at any point in time handle the two packages of mercun bola and that he only saw them from afar;

(2) He saw the accused handing them over to DW3;

(3) He said it happened a long time ago and that the last time that he saw the accused was before the fasting month in 2009;

(4) Hee said he did not see the accused in 2010; and

(5) He said he would not know whether the accused had kept other mercun bola with him.

[316] When DW2 was cross-examined by Puan Faezah, the learned DPP:

(1) He disagreed with her suggestion that he did not witness the handing over of the two packets of "mercun bola" by PW18 to the accused as he was some distance away from the accused and PW18 and it was dark at the pond;

(2) He also disagreed with her suggestion that he did not see the two packets of "mercun bola";

(3) He said he had known the accused since 2000, that he also knows the accused's family, that he has a good relationship with the accused's family, that he knows that the accused owns a Toyota Hilux before the accused was arrested by the police, that he knows that the accused was charged for bombing two Chinese persons, that he learnt about the incident a week after it happened; that on 29 August 2010, at 7.30pm, while he was in Jitra, the accused phoned him and

A asked him to withdraw a sum of RM3,000 from the RM5,000 which the accused's company had credited into his account, that he then met up with the accused at 10pm in his rented house in Penang where he handed over to the accused the RM3,000, that the balance of the money was meant for his
B expenses;

(4) He agreed with the suggestion of the learned DPP that the accused looked "resah" in Malay which means "nervous, restless, fidgety, anxious" in English (see *Kamus Lengkap* by
C Drs Awang Sudjai Hairul (Sarjana Linguistics) and Yusoff Khan, BA Hons (London), Edisi Terbaru, p. 909) but he disagreed with her suggestion that the accused had told him he had a big problem; and

D (5) He also agreed with the suggestion of the learned DPP that he had seen the accused gambling at the internet café but he did not regard the accused as a gambling addict because the accused has a lot of money.

[317] At this juncture, the learned DPP applied to the court to
E commence impeachment proceedings against DW2 on the ground that there were seven material contradictions between the contents of his statement which was recorded under s. 112 of the Evidence Act 1950 (P1) by ASP Somu (PW22) and his testimony in court. She listed them out one by one to the court. Having
F looked at P1 the court agreed with her that they were material contradictions.

[318] Hence, the court allowed the impeachment proceedings to be instituted against DW2 by the prosecution. Nevertheless, after
G having heard the evidence of ASP Somu (SD2 in the impeachment proceedings) who had recorded P1 from DW2 the court found that P1 had not been recorded in accordance with s. 112 of the Evidence Act 1950. Hence, the court disallowed the credit worthiness of DW3 to be impeached.

H **[319]** This is because there was no signature of DW2 on the last page, ie, p. 5 of P1, to acknowledge as follows:

(a) that P1 was read back to DW2; and

I (b) that DW2 confirmed that he understood the contents, that the contents were correct, that DW2 did not wish to change any of his answers and that DW2 had made the statement voluntarily.

[320] Secondly, the contradictions could have arisen because DW2 had answered questions in the Kedah Malay dialect posed to him in the Malay language by SP2 and, therefore, there was a possibility that DW2 did not fully understand the questions posed to him by SP2 and SP2 also did not fully understand DW2's answers.

[321] Thirdly, DW2 had insisted that the answers given by him in court were the truth because he had taken an oath to tell the truth.

[322] Having seen and heard DW2's testimony the court found that his testimony did not match PW18's testimony concerning the size of the "mercun bola" which PW18 said he had handed over to the accused at the pond in Penang. PW18 had also said that the accused was alone when he handed over the "mercun bola" to the accused. Apart from these two contradictions between DW2's testimony and PW18's testimony, the court found DW2 to be an honest witness and his evidence credible.

DW3's Testimony

[323] DW3 in his testimony said as follows in his examination-in-chief:

(1) Between 2009 and 2010 he was working in Penang with the Telekom Malaysia Berhad;

(2) He was responsible for supervising the installation of telecommunications equipment by the accused's company;

(3) He has a good relationship with the accused both at work and off work;

(4) The accused has visited his orchard in Hulu Langat and he had confided in the accused his problem concerning the eating of his fruits from his fruit trees by monkeys and the damaging of his crops by wild boar;

(5) The accused asked him why he did not ask someone to shoot the monkeys and the wild boar;

(6) He said he would prefer an alternative way of dealing with the problem;

A (7) The accused then suggested to him to use firecrackers to scare away the monkeys and wild boar but he informed the accused that he did not have any firecrackers;

(8) Subsequently, the accused visited him with DW2 in 2010
B and the accused gave him two packages of firecrackers, ie, "mercun bola";

(9) He found that the 50 firecrackers in the two packages were smaller than his thumb;

C (10) He did not use all of them and he still had 21 firecrackers with him and he tendered to court the balance 21 firecrackers in its original plastic packet (D142 (1-21);

(11) He said he had never seen the large sized firecrackers; and

D (12) He also said he did not pay any money to the accused for the firecrackers.

[324] When he was cross-examined by the learned DPP, his testimony did not change. He disagreed with the suggestion of the
E learned DPP, that he was very close with the accused. He maintained that he was close to the accused. He also disagreed with the suggestion of the learned DPP that the firecrackers which he had tendered to court were not the balance of the firecrackers which had been given to him by the accused.

F

[325] In his re-examination, his testimony remained the same. He said that the firecrackers were in their original plastic packets when the accused gave them to him.

G **[326]** Upon being questioned by the court, he said that he was not called by the police to have his statement recorded. He also said that he did not read in the newspaper that the accused was suspected of having bombed the internet café because he was busy and he did not buy or read the newspaper. The court found his explanation reasonable and the court accepted it.

H

[327] However, two or three weeks after the incident, he was informed by his officer that the accused was suspected of having made the bomb (which was used in the incident) but he had forgotten the name of his officer. Nevertheless, he did not go to
I the police station to inform the police that the accused had given him the firecrackers prior to the incident. The court accepted his explanation as reasonable since the accused was his friend and he

would not wish to give the police the impression that there was something sinister in the accused giving him the "mercun bola" since the accused had given them to him with good intentions.

[328] Having seen and heard DW3's testimony, the court found DW3 to be an honest witness and his testimony to be credible although the court did note that there was a contradiction between his testimony and PW18's testimony concerning the size of the "mercun bola" which PW18 said he had given to the accused. PW18 had said he gave the accused two packets of the medium sized "mercun bola". DW3 said the accused gave him two packets of the small sized "mercun bola".

The Main Thrust Of The Accused's Defence

[329] Based on the accused's defence as set out above, it is clear, that the main thrust of the accused's defence, is as follows:

(1) Prior to the incident he did not angrily tell PW11 of his desire to bomb the towkay of the internet café, ie, PW9 and Ah Soh, ie, NSH. Prior to the incident, he also did not angrily tell PW17 of his desire to set fire to Ah Soh, ie, NSH, and the internet café, on two occasions while they were drinking in Abang Zul's shop in Bandar Tun Razak on account of his gambling losses;

(2) He had never said that he wished to bomb (the towkay and NSH) or to set fire (to NSH and the internet café). It was another friend who had, in the presence of Abang Zul, ie, one Encik Zulkarnain and his son by the name of Bakar, said "kau bakarlah kedai ini", ie, "you set fire to the shop" if a patron wins the jackpot at the internet café and the towkay did not pay the winnings to the patron. However, when asked who was the person who had said those words, he said he could not remember. He insisted that those words were uttered by many people at Encik Zulkarnain's shop but not by him;

(3) He was the man whose image was captured in the first CCTV recording. He had gone up to the deceased's apartment at about 3.09am, that morning, with good intentions and solely to deliver a bag which contained only "jeruk dan buah limau barli" in Malay which means "pickles and pomelos" in English to NSH by leaving it outside her

A apartment in order to thank her for having given him cash of RM300 upon the demise of his father and three hampers for the approaching Hari Raya;

(4) Prior to leaving the bag in front of her apartment, the B accused had gone to the internet café with the intention of giving the bag in person to NSH but she was not there and he had waited for her to show up;

(5) Only after he had waited for her for a considerable time in C the internet café and she did not show up that he then took the bag with its contents upstairs to the 12th floor and left the bag in front of her apartment. He did so in order that the bag could be seen easily by NSH when she came out of her apartment as his intention was to give it to her;

D (6) He could not have made the pomelo bomb using the "mercun bola" which he obtained from PW18 because he had given them to DW3 the very next day in the presence of DW2 and both DW3 and DW2 had corroborated his evidence to this effect in their sworn oral testimonies. In E fact, DW3 even brought the balance of the "mercun bola" to court;

(7) He did not know know how to make the pomelo bomb and the police did not find anything in his laptop computer which F showed that he had accessed sites which taught people how to make the pomelo bomb;

(8) He was forced by PW13 to make the confession and hence he admitted that he had done it in order to placate and satisfy PW13 and he also assured PW13 that he would G surrender himself to the police after he had sorted out his work affairs and had made financial provision for his wife and children for the approaching Hari Raya;

(9) In the meantime, he had to find sufficient funds to engage a H lawyer and he did not surrender himself to the police because he had not raised sufficient funds to do so yet and he was afraid that he would be arrested immediately upon doing so;

I (10) He did not and could not have made the confession to PW16 because he did not speak to PW16 during his stay with PW16 before his arrest, he did not cause the explosion,

and he also had no opportunity to confess to PW16 because in the day time PW16 would be at work and upon his return from work PW16 would go out again and PW16 did not even know that his name is Khayry as reported in the newspaper;

(11) He did not know anything about the explosion involving the pomelo bomb which had resulted in the deaths of NSH and GYS because on the day following the incident he left his home after he was chased out by his wife who accused him of having an affair with another woman;

(12) He only came to know about it when PW13 confronted him with the newspaper which had reported the incident and his suspected involvement in it and that he was shocked upon learning about it as he was close to NSH;

(13) Although he had asked NSH for a loan on the eve of the incident he did not indicate the amount, it was NSH who mentioned the amount of RM20,000, he did not warn her when she said she had no money, and he merely said to her that she could take her time to give him the loan when she had the money;

(14) He did not suffer substantial gambling losses;

(15) He did not owe NSH a substantial amount of gambling debts as he was earning RM15,000 a month from his one year sub-contract under a main contract given by Telekom Malaysia Berhad and hence he had no motive or reason to kill her; and

(16) He did not know GYS prior to the incident and hence he had no motive or reason to kill him.

Submissions Of The Prosecution At The Close Of The Defence Case

[330] The learned DPP submitted that the defence did not cast a doubt on the prosecution case and that the prosecution had proved the two counts of murder against the accused beyond reasonable doubt. He urged the court to find the accused guilty as charged and to convict him and to impose upon him the mandatory death sentence for each of the two counts.

A **Submissions Of The Defence At The Close Of The Defence Case**

[331] The defence reiterated its submissions at the close of the prosecution case. In addition the defence submitted as follows in
B its written and oral submissions:

(1) There is no evidence that the accused had made preparations to kill NSH and GYS by making the pomelo bomb;

(2) There is no evidence that the accused had the requisite
C knowledge to make the pomelo bomb which had exploded and killed the two deceased persons;

(3) There is no evidence that the bag which the accused was carrying contained the pomelo bomb;

D

(4) There was a four hours gap between the time the accused placed the bag in front of the apartment and the time the explosion occurred and the prosecution did not close this gap with evidence;

E (5) The motive of the accused to kill the two deceased persons has not been proven as the accused had a good and close relationship with NSH and the accused had no relationship with GYS and hence he had no motive to kill GYS;

F (6) The firemen were not called as witnesses and the prosecution did not obtain and produce the report from the fire department and hence a doubt was cast on the prosecution case;

G (7) There is no evidence to show the get up of the pomelo bomb and how the pomelo bomb exploded, ie, what was the source of the flame which caused the black powder to ignite and explode;

(8) The police officer who conducted the simulation of the bomb
H was not called as a witness;

(9) The damage to the front wooden door of the apartment was to the upper portion whereas the bag was placed on the floor and this has not been explained by the prosecution;

I

(10) There is no evidence as to know how the accused made the pomelo bomb;

(11) There is a possibility that the bag which was placed by the accused was switched with a bag containing the pomelo bomb by someone else as there was evidence that there were people who were unhappy with the illegal internet café which allowed illegal gambling by its patrons; and

(12) The evidence at the conclusion of the trial is insufficient for the court to convict the accused for the two counts of murder.

[332] The defence submitted that in view of the evidence adduced by the defence and the submissions of the defence, the defence has succeeded in casting a doubt on the prosecution case, that the prosecution had failed to prove the two counts of murder beyond reasonable doubt against the accused and that the accused ought to be acquitted and discharged of the two counts or murder.

Decision Of The Court At The Close Of The Defence Case

[333] At the close of the defence case, having considered the defence case in the light of the prosecution case and the submissions of both parties, the court was satisfied that the defence of the accused had failed to cast a doubt on the prosecution case.

[334] The court was satisfied that the prosecution had proved the guilt of the accused beyond reasonable doubt for the two offences of murder as per the two counts.

[335] The court, therefore, found the accused guilty as charged.

[336] The court convicted the accused on both counts and sentenced the accused to death for each of the two offences (the "said decision").

[337] Being dissatisfied with the said decision, the accused has filed a notice of appeal to the Court of Appeal against the said decision.

A **Reasons Why The Court Was Satisfied That The Defence Of The Accused Did Not Raise Any Reasonable Doubt In The Prosecution Case And That The Prosecution Had Proved The Two Counts Of Murder Beyond Reasonable Doubt Against The Accused**

B

[338] The reasons why the court was satisfied that the defence of the accused did not raise any reasonable doubt in the prosecution case and that the prosecution had proved the two counts of murder beyond reasonable doubt against the accused under cl. (c) of s. 300 of the Penal Code are as follows:

C

[339] Firstly, I shall deal with the standard of proof at this stage, ie, at the end of defence case. It is expressly provided in s. 182A of the Criminal Procedure Code that the standard of the proof at the end of the defence case is proof beyond reasonable doubt.

D

[340] The section states as follows:

> **Procedure at the conclusion of the trial**
>
> **182A.** (1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> **(2) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it.**
>
> (3) If the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order or acquittal. (emphasis added).

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[341] At this stage, the defence has an evidential burden to raise a reasonable doubt in the prosecution case although the burden to prove the charge against the accused beyond reasonable doubt rests throughout on the prosecution.

H

[342] In *Balachandran v. PP*, *supra*, the Federal Court held that an accused can be convicted at the close of the prosecution case if the prosecution has succeeded in proving a *prima facie* case against him and if the accused chooses to remain silent after his defence is called. The reason is that at the stage unless the accused in his defence succeeds in raising a reasonable doubt as to his guilt, the *prima facie* case will become a beyond reasonable doubt case.

I

[343] At p. 100 (CLJ); p. 339 (AMR) the eminent judge, Augustine Paul FCJ said as follows:

> As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. *Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt* ... (emphasis added).

[344] In *PP lwn. Ho Sek Kong* [2006] 5 CLJ 49, Abdull Hamid Embong J (later JCA and now FCJ) after quoting the above paragraph held as follows at p. 61:

> This aspect of proving a case beyond a reasonable doubt has remained steadfast over the years. Over fifty years ago, the Court of Appeal in *Chan Chwen Kong v. PP* [1962] 28 MLJ 307 enunciated the same principle in the following words of Thomson CJ:
>
> > In most criminal cases there is at some stage an onus of a sort upon the accused person. *Once the prosecution produces evidence which if believed would support a conviction there is a tactical onus on the accused person either to produce evidence on his own or to point to something in the prosecution evidence that at the very lowest make the trier of fact less than sure of any conclusions he might otherwise be prepared to base upon the prosecution evidence. If he fails to discharge that tactical onus he will be convicted. That is very true.* (emphasis added).

What Constitutes A Reasonable Doubt?

[345] Secondly, I shall deal with what constitutes a "reasonable doubt"? In *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 Sharma J (as His Lordship then was), said that it is not mere possible doubt. It must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence. It must be doubt which settles in your judgment and finds a resting place there. It must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given.

[346] This is what His Lordship said at p. 17:

> The following definition of 'reasonable doubt' is often quoted:
>
> > **It is not mere possible doubt**, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. *It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.*
>
> It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. *It is a doubt which settles in your judgment and finds a resting place there." Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.* (emphasis added).

[347] Denning J in the case of *Miller v. Minister of Pensions* [1947] 2 All ER 372 held that the degree of proof which is required before an accused can be convicted need not reach certainty. However, it must carry a high degree of probability. In other words, the evidence must be so strong that fanciful and remote possibilities can be dismissed but there is no necessity to prove the charge against an accused beyond the shadow of a doubt.

[348] At p. 373G-H, His Lordship described the degree of proof required in criminal cases as follows:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. *If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with that sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.* (emphasis added).

[349] Lord Hewart CJ in *R v. Podmore* [1930] 22 Cr App R 36 held that a reasonable doubt is not some whimsical or fanciful doubt. It must be such a doubt as would govern a man's course of action in some private affair or moment of his own.

[350] This is what His Lordship said in that case:

> "You will not, I am sure, allow yourselves to be bewildered or troubled by such a phrase. **What it means is not some whimsical or fanciful doubt, which a person might conjure up for the purpose of creating a difficulty, but such a doubt as would govern a man's course of action in some private affair or moment of his own.** (emphasis added).

[351] Both cases were cited with approval by Thomson CJ in the local case of *Liew Kaling & Ors v. PP* [1960] 1 LNS 60; [1960] MLJ 306.

[352] Therefore, it is clear that the court has to consider two main issues at the close of the defence case. They are as follows:

Issue (2): Whether The Defence Has Raised A Reasonable Doubt In The Prosecution Case?

Issue (3): Whether The Prosecution Has Proved A Beyond Reasonable Doubt Case Against The Accused At The Close Of The Defence Case As Mandated By S 182A(2) Of The CPC?

[353] Applying the established law and legal principles as enunciated and applied in the cases cited above by the learned DPP to the accused's defence in the instant case, I was satisfied that issue (2) and issue (3) had to be decided in the negative against the accused. Hence, the court held that the defence, after calling three witnesses to the stand, had failed to cast a reasonable doubt on the prosecution case and that the prosecution had proved the two counts of murder against the accused beyond reasonable doubt.

[354] My reasons are as follows:

[355] In my judgment, at the close of the defence, having considered the defence against the backdrop of the evidence supporting the prosecution case, ie, at all the documentary evidence including the photographs, the two CCTV recordings, the physical exhibits, the testimonies of PW9, PW12, PW10, PW15, PW14, PW23, PW11, PW17, PW34, PW35, PW36,

A PW26, PW19, the evidence of Insp Lew Kheng Joe (PW38), ASP Somu (PW22), Insp Somchard (PW31), Supt Soo Mee Thong (PW32), the government chemist (PW30), the bomb expert, DSP Zainal bin Atan (PW37), and the two confessions of the accused made to PW13 and PW16 after the incident, no benefit of the
B doubt could be given to the accused as to the guilt of the accused in the instant case in respect of the two counts of murder with which the accused was charged.

[356] No reasonable inference could be drawn in favour of the
C defence by virtue of the various grounds raised by the defence in the submissions of his learned counsel because of the following reasons:

(1) As stated above it is trite law that the prosecution has only to prove the guilt of an accused person beyond reasonable
D doubt.

(2) It is trite law that there is no burden on the accused to prove his innocence.

E (3) It is trite law that there is no burden on the prosecution to prove the guilt of an accused person beyond a shadow of a doubt.

(4) In the classic and oft-quoted case of *Sunny Ang v. PP* [1965] 1 LNS 171; [1966] 2 MLJ 195, the deceased's body
F was never recovered, yet the accused was found guilty by the Singapore High Court and convicted for the murder of his girlfriend when she disappeared while diving because the prosecution was able to prove by way of circumstantial
G evidence that the deceased was last seen alive with the accused; that the accused had been made a bankrupt and was in need of money; that the deceased was insured against accidents with several insurance companies, totalling RM450,000 before the accused took her diving under the
H pretext of looking for corals; but she did not put on her pair of gloves as both pairs of gloves were found in the boat from which she had dived into the sea; that the accused had taken the deceased to a legal firm where she made a will in which she declared the accused's mother the sole
I beneficiary of her estate; that the accused allowed her to go down diving by herself even though the deceased was a novice scuba diver; that one of her flippers had been cut and was found in the bottom of the sea; that when she did not

surface, the accused did not immediately go down to look for her; and that less than 24 hours after her disappearance the accused made financial claims on the three insurance companies which had issued policies covering her against accidents. Therefore, the High Court of Singapore rejected the accused's defence of accidental drowning. The accused's appeal to the Federal Court against his conviction and sentence of death was dismissed, and he was also refused leave to appeal to the Privy Council.

(5) The court agreed with and accepted the submissions of the learned DPP that the accused's defence that he had gone up to the deceased's house at about 3.09am that morning to deliver a bag which contained "jeruk dan buah limau barli" in Malay which means/pickles and pomelos" in English is clearly an afterthought.

(6) In my judgment, the defence was clearly a recent invention which was kept up his sleeve and only sprung onto the prosecution as a surprise during the defence case.

The reasons are as follows:

(a) The accused's defence was never put to any of the prosecution witnesses during the prosecution case. The prosecution had called 40 witnesses altogether to testify against the accused during the prosecution case but it was never suggested to any of them that the accused was actually sending "jeruk" in the blue bag to NSH. As stated earlier, the word "jeruk" is a Malay word which means "pickles" in English; and

(b) The closest the defence came to raising this defence in the prosecution case was only during PW9's cross-examination when the defence suggested to PW9 that the accused used to buy "buah" for Aunty (NSH). The court noted that the word used in the suggestion was only "buah" in Malay which means "fruit" in English and not "jeruk" in Malay which means "pickle" in English.

(7) In *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 the court held that it behoves the defence to put its case at the earliest possible stage to the prosecution

witnesses otherwise it could be branded as a recent invention if the defence is sprung in court for the first time when the accused makes his defence from the witness box. This is what the court said at p. 292f-g:

> The trial Judge appreciated correct law when he held, as he did in fact hold, that *the defence is entitled, through cross examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in Court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticised for having kept his defence "up his sleeve", so to speak, and it being branded as a recent invention.* (emphasis added).

(8) Be that as it may, in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209, the Federal Court allowed the appellant's appeal against his conviction and sentence of death because the trial judge did not consider the defence on the sole ground that it was not put to the prosecution witnesses in the course of the prosecution case. The Federal Court held that it was a serious misdirection and had occasioned a miscarriage of justice because the onus was on the prosecution to prove the charge against the accused beyond reasonable doubt. Hence, it was incumbent on the trial judge to consider the defence despite the failure of the defence to do because the defence, however, weak and suspicious it may appear to the trial judge, did not relieve the prosecution of its burden of establishing the case against the accused beyond any reasonable doubt.

(9) Edgar Joseph J (later FCJ), in delivering the judgment of the Federal Court said at p. 718 (CLJ); p. 218C-G (MLJ) as follows in connection with the duty of a trial judge to consider the defence of an accused person, even if it was not put to the prosecution witnesses before the accused takes the witness stand, no matter how weak the defence may be:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment,

> that the defence is a recent invention - in other words, 'kept up its sleeve', as it were - and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.
>
> ... it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

And at p. 719 (CLJ); p. 219D-G (MLJ), as follows:

> To resume our discussion regarding the important point of misdirection as regard the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the judge to have criticized the defence for having failed to put to the investigating officer, the name of Che Mat, or the latter's telephone number or his place of abode, for the simple reason that these particulars had been disclosed in the cautioned statement of the appellant made the day after his arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the prosecution to check on whether the appellant's version of the facts, as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the matters aforesaid to the investigating officer, having regard to their prior disclosure in the cautioned statement.

(10) Having considered the defence of the accused, I was of the view, that no one in his right mind would send gifts of fruits and pickles at odd times especially in the wee hours of the morning by leaving them in front of their friends' or relatives' homes no matter how close they are without telling or alerting the recipient about the gifts.

A (11) This is because the accused had testified to that effect as follows in Malay at p. 525, line 4 to line 6 of the notes of evidence:

> Pada malam itu saya ada pergi ke kedai game. Bila saya pergi, *saya sebelum itu ada membawa buah limau dan jeruk dari rumah. Saya beli buah limau di Giant. Beli jeruk dan simpan di rumah. Pergi ke kedai game, saya ingat hantar jeruk ke rumah kakak*. On the way ke kedai game, saya singgah beli limau. Saya ingat kakak ada di kedai game. Bila sampai, kakak tidak ada di situ. Sementara tunggu dia datang, saya main game. Sudah lama, kakak masih tidak datang. (emphasis added).

(12) Apart from that, the accused had admitted that he had NSH's phone number but he also admitted that he did not call her to tell her that he was sending some fruits and pickles to her by leaving them outside her apartment as he did not wish to disturb her by waking her up from her sleep. He also did not tell her that he had sent some gifts to her, ie, two pomelos and some pickles, and that he had left them outside her apartment as he did not wish to disturb her by waking her up from her sleep. This part of the accused's story is, therefore, very highly unlikely and clearly a creation of his own mind in order to extricate himself from the two serious counts of murder facing him.

(13) Apart from that, in my judgment, the accused's story did not raise a reasonable doubt in the prosecution case because the accused was very evasive during cross-examination. He had answered "tidak pasti" in Malay which means "Not sure" in English to suggestions that PW9 and the accused's five friends, who consisted of the following prosecution witnesses:

(a) Encik Mohd Nordin bin Abdullah (PW13);

(b) Encik Mohamad Zukarnain bin Shariff (PW17);

(c) Encik Abdul Wahid bin Muhammad Akim (PW16);

(d) Encik Shariff bin Mat Hanapiah (PW18); and

(e) Encik Abdul Rahman bin Abdul (PW11)

did not have any grudge against him and, therefore, could not have wished to frame him up in that manner and yet they had testified positively and categorically against him.

The court noted that PW17 and PW11 were his friends who had testified to that effect under cross-examination upon oath in this court.

(14) He even said that PW13 and PW17 were not close to him as opposed to what the witnesses themselves told the court that they were close to the accused having known the accused for some time. His explanation concerning why he had said to PW17 and PW11 that he wanted to set fire to NSH's shop was extremely unsatisfactory. He denied he ever said those words to them. This was in sharp conflict to what the two witnesses had said.

(15) The accused denied ever admitting to PW13 and PW16, that he had placed the bomb in front of NSH's apartment, whereas the sworn oral testimonies of these two witnesses were strongly positive and cogent and they remained unshaken during their cross-examination.

(16) The reasons why in my judgment it was most unlikely that PW13 would frame the accused in the instant case are as follows:

(a) PW1 has a good relationship with the accused who is his neighbour's grandson. PW13 has known the accused since he (PW13) was aged 10 or 11 years. PW13 and the accused are also golf buddies as they play golf together;

(b) The accused has also given work to PW13 who operates a furniture business by recommending his friends who wish to make cabinets for their houses to PW13;

(c) Hence, PW13 actually owes the accused a debt of gratitude and is obliged to the accused and therefore, the court made an inference that PW13 would not frame the accused by telling lies against the accused or to force the accused to admit doing something that the accused had not done especially committing the crime of murder and that also the two crimes of murder since two persons had died as a result of his acts;

A (d) There is also no evidence forthcoming from the defence that there is any enmity, bad blood or misunderstanding between the accused and PW13 which could cast a doubt on the truth of PW13's testimony;

B (e) There is also no reason advanced by the defence as to why PW13 would wish to frame the accused in that way except to say that PW13 said he (PW13) was implicated by the police in the matter but there was no evidence that PW13 was an accomplice to the crimes C alleged to have been committed by the accused or an accessory before the fact of the alleged commission of the crimes by the accused; and

(f) There is no evidence or suggestion that PW13 is in any way related by blood or marriage to or connected to D the two deceased victims in any other way or that PW13 would stand to gain a benefit or advantage if the accused was found guilty and convicted of the two counts of murdering them.

E (17) The accused also insisted that he did not own a Toyota Hilux but DW2 testified to the contrary and contradicted the testimony of the accused.

(18) In my judgment, there was no plausible explanation given by F the accused against the prosecution case during the whole of the defence case bearing in mind that the picture of the accused carrying a blue bag, which appeared heavy, and walking into the lift and walking out of the lift still carrying the same blue bag at the 12th floor where unknown to the G accused, his movements were captured and recorded by the CCTV surveillance camera and where the fire and explosion had occurred, subsequently. It was most probable that the accused had made up a totally different story in order to exculpate himself from being found guilty for having H committed the crimes.

(19) In my judgment, the accused was clearly lying when he said as follows:

I (a) He was chased out of the house by his wife who had accused him of being unfaithful to her and as a result of that he was actually running away from his wife;

(b) He ran away to Kampung Paya Jaras because he did not want his wife to know, presumably, to prevent her from locating him; and

(c) He had left the Proton Saga car parked at the car park of the Sungai Buloh Hospital because he did not want to have anything in his possession which is connected to his wife;

because he had also admitted that he did call his wife to ask her to remove the Proton Saga car which he had parked at the Sungai Buloh Hospital, hence blowing away what he had claimed was his attempt to hide his whereabouts from her.

(20) When the learned DPP cross-examined the accused as to why he was seen trying to hide his face when he came back to the lift at level 12 of the Apartment Desa Tun Razak, after having disposed off the heavy bag with its contents, the accused simply answered that he did not do that.

(21) However, the court noted that it could be clearly seen in the CCTV recording of the incident that when he walked back to the lift, he was seen walking very closely to the wall by leaning his body against the wall and he went into the lift with his face concealed by the wall very much like a person who was fully aware that he had done something very serious and very bad like leaving the pomelo bomb in front of the apartment with the intention to kill NSH and PW9 and also knowing that his act was so imminently dangerous so as to cause the death of NSH and PW9 or such bodily injury that would in all probability cause NSH and PW9's deaths as the object which he had hidden inside the bag was a bomb which was made using "mercun bola" and petrol and not just pickles and pomelos.

(22) The only explanation the accused gave to this question was merely "Saya tidak ada melakukan jenayah. Kenapa perlu menyorok?" which are in Malay and which means "I did not commit any crime. Why the necessity to hide?" in English. To my mind his answer is too simplistic and was in sharp conflict with the guilty behaviour and conduct displayed by him at the material time.

A (23) Based on the reasons as stated above and the totality of the evidence before the court, the court was satisfied that the accused's evidence was a total lie.

(24) Apart from that, based on the totality of the evidence, the
B court was satisfied that the accused's evidence and the evidence of his two witnesses (DW2 and DW3) did not create a doubt in the prosecution case as to his guilt for the two murders and the court will say much more about this later.

C (25) In my judgment, the accused created a totally different story knowing very well that it might save him from being convicted with two capital offences with which he was charged. He was trying very hard to dismiss what the prosecution witnesses had testified against him.
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(26) The court found that there was no reason at all for any of the prosecution witnesses including his friends to frame him up in that manner and to lie in this court knowing fully well that the accused was facing two counts involving two capital
E offences and that if the accused was found guilty by the court, the court would impose on the accused the mandatory death sentence for each of the two capital offences. As stated earlier, even the accused in his sworn oral testimony could not give any explanation as to why they
F had done that.

(27) The other two witnesses (DW2 and DW3) who were called by the defence also did not shed any further light on the accused's story and their testimonies did not cast any doubt
G on the prosecution case.

(28) They merely told the court that the accused did buy some firecrackers shaped like small balls called "mercun bola" in Malay which means "ball firecrackers" in English as they are round in shape like a ball and the accused, subsequently,
H gave them to DW3 for use by DW3 in his (DW3's) orchard in Hulu Langat in order to scare away the wild monkeys which were eating the fruits from his fruit trees and the wild boars which were destroying his plants and/or fruit trees.

I (29) In my view, the evidence given by these two defence witnesses were equivocal and it had nothing to do with what happened on the day of the incident. The buying and giving

away of the "mercun bola" to DW3 according to the two witnesses happened in the month of July whereas the incident happened on 29 August 2010. Hence, in my view, the evidence of these two defence witnesses were too remote and insignificant and could not and did not in any way cast a doubt on the prosecution case.

(30) It is trite law that even though the court did not believe the story of the accused and his two witnesses, the court is duty bound to proceed further and to consider whether the accused's story or explanation has succeeded in casting a doubt on the prosecution case. The reason is because as stated earlier it is trite law that there is no burden on the defence to prove that the accused is innocent. The burden to prove the guilt of the accused rests throughout on the prosecution.

(31) In the classic case of *Mat v. PP* [1963] 1 LNS 82; [1963] 29 MLJ 263, concerning the meaning of the burden of proof by the accused in cases where it is necessary for him to rebut the prosecution case against him Suffian J (as he then was) held, *inter alia*, that if the court accepts or believes the accused's explanation then the court must acquit and discharge the accused.

At pp. 263 I to 264 A-D His Lordship said as follows:

> The correct law for Magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.
>
> The position may be conveniently stated as follows:
>
> (a) If you are satisfied beyond reasonable doubt as to the accused's guilt ... Convict.
>
> (b) If you accept or believe the accused's explanation ... Acquit.

(c) If you do not accept or believe the accused's explanation	...	Do not convict but consider the next steps below.
(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt	...	Convict.
(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt	...	Acquit.

(32) The above statement of the law to be applied by Magistrates is also applicable by High Court Judges as well who sit alone without a jury. In the case of *PP v. Mohd Radzi Abu Bakar*, *supra*, Gopal Sri Ram JCA said as follows at p. 467 (CLJ); p. 400F (MLJ) concerning the step to be taken by the trial court after defence is called and the accused elects to give evidence:

> (iv) after defence is called, the accused elects to give evidence then go through the steps set out in *Mat v. Public Prosecutor* [1963] MLJ 263.

(33) In the instant case, the court found as a fact that the accused had a motive to kill NSH and PW9, ie, he clearly had an axe to grind with NSH and PW9 as there was overwhelming oral evidence that the accused had gambled and lost heavily in the internet café and apart from that he had tried to obtain a substantial loan from NSH on the eve of the incident but his request was rejected by NSH and the accused must have felt betrayed by NSH in view of their close relationship and that NSH had profited from their close relationship and this must have been the proverbial straw which broke the camel's back as the accused was already angry with NSH and PW9 prior to making the request for the loan to NSH based on the cogent and positive sworn oral testimonies of PW11 and PW17 concerning his desire to bomb the towkay of the internet café and NSH and to set fire to NSH and the internet café.

(34) The court found as a fact that the warning with the implicit threat that something bad would befall NSH the following day was uttered directly by the accused to NSH on the eve of the date of the incident, at 8pm and related by NSH to PW9.

(35) This evidence is clearly admissible as her dying declaration because it was closely linked to the fire and explosion which caused NSH to suffer the fatal injuries the very next morning, at about 8.30am, and therefore, in terms of the close proximity of the time between the threat and the incident, there was a sufficiently strong nexus between the two events.

(36) The court found as a fact that the bag containing the bomb was placed directly outside PW9's and NSH's apartment and this was consistent with the accused's warning coupled with the implicit threat to NSH the night before and it was also consistent with his expressed wishes as testified to by his friend (PW17), ie, to set fire to the internet café, and by a former employee (PW11), ie, to bomb PW9 and NSH.

(37) The accused being undisputedly close to NSH and being a regular patron of the internet café would know NSH's daily routine and that she and PW9 would definitely see the bag containing the two pomelos outside the front door upon either of them opening the front door of their apartment.

(38) By virtue of the same reasoning, the court found as a fact that the accused would also know that the two pomelos would attract NSH's attention, that she would find them irresistible and hence there was a very strong probability of her lifting up either one or both the pomelos from the box inside the bag which would trigger off the bomb because the accused had purchased fruits for her before from his outstation trips to Penang and he knew that she was particularly fond of pomelos as she would even use them in her prayers.

(39) In view of the circumstances of the instant case, the court found as a fact that it could not have been a mere coincidence that the size and colour of the two pomelos bought by the accused from the Giant Supermarket and the two pomelos found at the scene were similar.

(40) The court also found as a fact that there were pieces of blue coloured plastic among the items left at the crime scene after the explosion but that there were no pickles or remnants of pickles left at the crime scene and that the accused could not explain away this fact except to say that he found it strange which explanation was not plausible and hence was rejected by the court on the ground that it was not consistent with his innocence.

[357] The court has given anxious consideration to the defence of the accused that he is innocent of the two counts of murder which he stood charged before the court. In doing that the court has considered that in his defence the accused sought to explain that his possession of the various items recovered by and seized from the three places by the police and his purchase of the screwdriver from the Giant Supermarket were done innocently and were not intended to be used and were not used to make the pomelo bomb. As stated earlier the accused had explained as follows:

(a) He uses the small saw with the yellow handle to make a cut in the ceiling to allow the wire to go through the ceiling;

(b) He uses the electrical casing to install the cable wiring in dry areas;

(c) He uses the PVC pipe to install the cable wiring in wet areas;

(d) He uses the elbows to divert the flow of the water for the purpose of the installation of the cable wiring, and

(e) He uses the screwdriver in the course of his work.

[358] The defence contended that these items are actually the tools which the accused uses in carrying out the installation of the wiring in the course of his work as a telecommunications contractor. The defence contended that the tools are necessary and essential for the purposes of his work. The defence contended that the seized items were not intended to be used for the purpose of making the pomelo bomb and were not, in fact, used by him to make the pomelo bomb.

[359] As for the five boxes of matches which were found on the floor of the balcony of his house, the defence contended that these items were for his home use and could be easily found in any household.

[360] The court was of the view that the accused's explanation for his possession of the seized items and the accused explanation for his obtaining of the "mercun bola" from PW18 by themselves, when considered separately, and together, could have raised a doubt in the prosecution case in the absence of the following pieces of circumstantial evidence:

(1) The expression by the accused of his desire to a friend (PW11) that he wished to bomb PW9 and Ah Soh prior to the incident;

(2) The expression by the accused of his desire to another friend (PW17) that he wished to set fire to NSH and the internet café prior to the incident;

(3) The warning which the accused gave to NSH on the eve of the incident which she narrated to PW9, ie, 12 1/2 hours before the pomelo bomb exploded killing NSH and GYS;

(4) after the incident, the accused had absconded and a day after the incident, he had gone to stay with PW16 and he stayed with PW16 until his arrest on 24 September 2010 by the police; and

(5) the accused's two confessions to PW13 and PW16 while the accused was staying with PW16 that he had caused the explosion in which the two deceased persons died by making the pomelo bomb and by placing it in front of the apartment as he was angry with PW9, NSH and the internet café over his gambling losses.

[361] The reasons are as follows:

(1) The accused's explanation concerning the "mercun bola" which he had obtained from PW18 was supported by the evidence of DW2, DW3 and the prosecution witness (PW18) even though the court did note that there was some discrepancy in the testimonies of the four witnesses concerning the size of the "mercun bola" which PW18 handed over to the accused. PW18 had testified that the "mercun bola" which he had handed over to the accused was of the medium size;

A (2) The accused and DW2 had testified that the "mercun bola" which the accused received from PW18 and which the accused gave to DW3 were of the small size. DW3 had testified that the "mercun bola" which he received from the accused were of the small size;

B (3) Nevertheless, in my judgment, the benefit of the doubt could be given to the accused because PW18 had also testified that he could not remember the exact size of the "mercun bola" which he had obtained from his friend and which he had given to the accused as the incident had occurred some two years ago;

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(4) In addition, the court had also taken into account that PW18 was positive that the pieces of "mercun bola" found and recovered from the crime scene by the forensic police were of the big size;

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(5) Hence, a doubt was created on the fact-in-issue whether the accused had obtained the "mercun bola" from PW18 with the intention of using them to make the pomelo bomb and whether the accused did, in fact, use them to make the pomelo bomb;

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(6) Nevertheless, the court was able to draw an inference from the accused's explanation concerning the obtaining and giving of the "mercun bola" to DW2 that prior to the incident the accused knew about "mercun bola", and he also knew that even the smallest sized "mercun bola" could be used to cause explosions in order to scare away monkeys and even large animals such as wild boars;

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G (7) However, because of the many other pieces of circumstantial evidence relied upon by the prosecution in the instant case, in my judgment, the accused's explanation concerning the "mercun bola" which he had obtained from PW18 and which he had given to DW3 was equivocal and was not consistent with his innocence in the instant case; ie, that he was not guilty of the two counts of murder;

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(8) This is because there is nothing in his explanation which had ruled out the possibility of the accused having obtained the "mercun bola" which were of the large size and which were used as one of the components of the pomelo bomb from a third party prior to the incident in order to cast a doubt on the prosecution case; and

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(9) This is so as there was a long interval between the date of his handing over of the "mercun bola" which he had obtained from PW18 to DW3 and the warning which he had given to NSH on the eve of the incident. Hence, he had the opportunity to obtain the "mercun bola" of the large size from other sources which were then used by him to make the pomelo bomb. Therefore, the irresistible inference which was drawn by the court from the proved primary facts was that he had done precisely that.

[362] In my judgment, the defence was an afterthought and was crafted onto the prosecution case in order to take advantage of the various pieces of circumstantial evidence in the prosecution case. The defence endeavoured to give a good and legitimate explanation for each of the pieces of circumstantial evidence relied upon by the prosecution. Nevertheless, in my judgment, the accused's explanations did not create a doubt in the prosecution case as to his guilt.

[363] The reasons are as follows:

(1) The accused's defence is that the bag which the accused was seen carrying into the lift and exiting on the 12th floor contained only fruits and pickles for NSH. The reasons he had done that were two pronged. Firstly, it was to thank her for a cash gift of RM300 and the gift of three hampers. Secondly, he knew for a fact that NSH liked pomelos as he had on previous occasions given her pomelos from Tambun upon his return from his outstation trips to Penang. However, the accused also said that the pomelos which NSH liked were the pomelos which the accused had bought from Tambun and not from the Giant Supermarket. Hence, in my judgment it was most probable that the accused had used the two pomelos as the bait to lure NSH to lift either one or both the pomelos in order to trigger off the pomelo bomb which fell within the category of a victim-activated type of bomb.

(2) The accused's defence is that there was a gap of some five hours between the sending of the bag by the accused on the one hand and the fire and explosion on the other hand. Hence, there was a possibility that someone else could have switched the bag because the remnants of the blue bag were not recovered from the crime scene. This someone else could have been a disgruntled patron who had gambled and

lost or a neighbour or a resident of the Apartment Desa Tun Razak who did not like to see school children patronising the internet café which was operating 24 hours a day without a licence or a business rival who wished to stop NSH and PW9 from operating the internet café. Yet, there was positive evidence that pieces of blue plastic were recovered from the crime scene by the police forensic team headed by PW32.

(3) The accused's defence is that he had a good and close relationship with NSH and had no reason to kill her let alone kill her in that manner. This was because in public he called her "Kakak" and she called him "Adik". Yet, in private he harboured malice, ill-will and hatred towards her because of his gambling losses and he had even expressed his desire to (PW11 and P17) to kill her and PW9. The accused also warned NSH on the eve of the incident when she told him she had no money when he had asked her for a substantial loan that tomorrow she will see and sure enough when tomorrow came the accused got his revenge because she and GYS were fatally injured by the fire and explosion upon the triggering off of the pomelo bomb.

(4) The accused's defence is that he did not even know GYS and therefore had no reason to kill him but he was clearly ignorant of the law, ie, s. 301 of the Penal Code. Furthermore, as far as the law is concerned, ignorance of the law is no excuse or defence for committing a crime. In this case the crime is the crime of murder against GYS.

(5) The accused's defence is that the accused could not have used the "mercun bola" which the accused obtained from PW18 to make the pomelo bomb because they were intended to be given to DW3 and that he did in fact give them to DW3 the very next day. The accused called DW3 as one of his witnesses. DW3 testified that he received the "mercun bola" the very next day. The accused also called DW2 as his witness and DW2 testified that he witnessed the handing over of the "mercun bola" by PW18 to the accused from a distance of about 20 feet away and that the accused then showed the "mercun bola" to DW2 while they were in the car. Hence, DW2 had a good look at the "mercun bola" inside the two plastic packets. However, the court noted that PW18 had testified that when he handed

over the mercun bola to the accused at the fishing pond in Penang there was no one else with them. Yet, the accused and DW2 said that DW2 was there at the material time but this was not suggested to PW18 when he was cross-examined by the defence. Be that as it may, the evidence of the giving of the "mercun bola" by the accused to DW3 by itself could not cast a doubt as to his guilt for reasons as stated earlier.

(6) The accused's defence is that the items seized from the three places were items usually used by him in the course of his work as a telecommunications contractor or for his household use. In my judgment, in view of the other pieces of circumstantial evidence, this explanation of the accused is equivocal and could not rule out the possibility that he had used the items to make the pomelo bomb.

(7) The accused's defence is that he did not flee from his house to PW16's house in order to avoid detection and arrest by the police because he felt guilty as he had committed a crime. The reason he left his home was because he was chased out of his house by his wife and he did not wish to have anything to do with her and did not want her to know of his whereabouts. In my judgment, the accused's explanation for his leaving his home did not create a doubt in the prosecution case. The reasons are as follows:

(a) It was a bare assertion unsupported by the testimonies of his two witnesses;

(b) The court noted that initially, the defence had informed the court that it wished to call the accused's wife as a defence witness after DW3 had completed giving his testimony;

(c) Hence, the defence successfully applied for an adjournment in order to allow the defence to call the accused's wife as a witness;

(d) However, upon the date fixed for the continuation of the defence case the defence informed the court that the defence would not be calling the accused's wife as a witness and the defence then closed its case;

A (e) According to the accused, he took his father-in-law's Proton Saga car to PW13's house because he was chased out of his home by his wife and he informed PW13 of this and PW13 had repeated this in his testimony;

B (f) According to PW13, the accused then left the Proton Saga car in the car park area of the Sungai Buloh Hospital before getting into PW13's car in which he was taken by PW13 first to Suhailee's factory and then C to PW16's house where PW13 then left the accused in PW16's house;

(g) According to the accused he later called his wife to inform her that the car was parked there;

D (h) In my judgment, the accused's explanation was not plausible because the totality of the evidence showed that the accused had taken steps to ensure that his movements after the incident could not be detected by the police but he took steps to ensure that his wife E was notified of his movements, ie that he had left the Proton Saga car parked in the car park area of the Sungai Buloh Hospital; and

(i) The court did not regard PW13's repetition of the F accused's explanation in his (PW13's) testimony as raising any doubt in the prosecution case because from the totality of the case the irresistible inference was that the accused had planned to kill NSH and PW9 in that manner and that he was not chased out of his home G by his wife. However, the accused had to give an acceptable reason to PW13 in order to induce PW13 to assist him in finding a place to say, ie, to hide from the police until he could raise sufficient funds to engage a lawyer to defend him. He knew that he could not H possibly tell PW13 the truth. So he invented the story that he left his home because he was chased out from his home by his wife in order to gain the sympathy of PW13.

I (8) The accused's defence is that he did not have substantial gambling losses or gambling debts because he was earning RM15,000 a month as a telecommunications contractor and he had a sub-contract worth RM700,000 for the installation

of broadband networking in Penang. Yet his bank statements did not reflect his good financial health and he could not produce a copy of the sub-contract to support his assertion. In addition, his friends and former colleagues testified that the accused had substantial gambling losses amounting to RM20,000 and also had gambling debts. On top of that based on the evidence of DW2, on the night of the incident, the accused had to drive to Jitra, Kedah to collect a sum of RM3,000 from DW2. Hence, this aspect of the defence case in fact supported the prosecution case that the accused was in need of money at the time of the commission of the offence because of his substantial gambling losses and it fortified PW9's testimony that on the eve of the incident the accused did in fact request for a loan on RM20,000 from NSH.

(9) The accused had also admitted that he had asked NSH for a loan the night before the incident but he denied having given her the warning. Yet PW9 testified that NSH had told him that the accused had given her the warning and she expressed her concern to PW9. As stated earlier, no good reason was given by the accused as to why PW9 would lie against him in that manner. The court found PW9 to be an honest and truthful witness.

(10) The accused's defence is that he did not make the two confessions to PW13 and PW16. Yet they testified to that effect in court. As stated earlier, no good reason was offered by the accused to explain away their testimonies. The court found both of them to be honest and truthful witnesses.

(11) With regard to PW16, the defence contended that there was no opportunity for the accused to confess to PW16 because PW16 did not spend time in the house with the accused. Yet the accused was staying with PW16 not only for one or two days but for more than three weeks, ie, 26 days, from 30 August 2010 until his arrest on 24 September 2010.

(12) With regard to PW13, the accused said he was forced to admit that he had done it to appease PW13. In my judgment, the accused's explanation is inherently incredible and illogical. This is because no reasonable person in the shoes of the accused would admit to having committed such a serious crime involving the bombing and killing of two

A human beings just to appease and satisfy a friend. The accused also assured PW13 that he would surrender. Yet the accused did not surrender himself but was arrested by the police a good 21 days after he agreed to surrender himself to the police.

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(13) In my judgment, the reasons given by the accused for not surrendering himself to the police pointed more to his guilt then to his innocence. If he was not the culprit, then all the more reason for him to surrender to enable the police to
C conduct their investigations, to clear his name quickly for his own sake and for the sake of his wife and six children and also to enable the police to apprehend the real culprit quickly since his "Kakak" with whom he professed to have a close relationship had been killed in such a violent and
D horrible manner and he would want to express his sympathies to PW9 and the family members of NSH for the sudden and tragic demise of NSH.

(14) In my judgment, it can be safely inferred by the court based
E on PW9's testimony and the physical evidence recovered from the crime scene which included pieces of blue plastic and PW37's opinion and P30's findings that the pieces of blue plastic are, in fact, the remnants of the blue bag. Hence, the submission of learned defence counsel that the
F blue bag used by the accused to send the gifts of pickles and two pomelos to the apartment was not the same bag which PW9 saw is without merit and did not cast a doubt on the prosecution case.

(15) The defence had tried to show that the accused could not
G have known about the incident until PW13 confronted him with the newspaper containing the news of his suspected involvement in the incident and that the accused immediately expressed his shock because there was no TV or newspaper in PW16's house. Yet, PW13 had testified that on the night
H PW13 confronted the accused in PW16's house with the newspaper containing the shocking news, PW13 had watched TV and had chit chatted with PW16 and the accused in the hall before taking the accused into an empty bedroom, showing the newspaper to the accused and then
I asking the accused whether what was reported in the newspaper was true.

(16) Hence, the accused had the opportunity of listening and watching the news on the TV as he was staying in the house. Yet, he chose to deliberately distance himself from the incident and to feign ignorance of the incident. In my view he had done this in order to support and fortify his defence that he was not a fugitive from the law but had to seek an alternative place to stay as he was chased out of his home by his wife over a marital problem and that even after he had reconciled with his wife he could not return to his house for fear of being arrested by the police as a suspect as he had not raised sufficient money to do two things, ie, for the expenses of his family for the Hari Raya and to engage a lawyer to defend him.

[364] At the conclusion of the trial, the court was satisfied that the defence of the accused was not plausible and was not consistent with his innocence. The court was satisfied that it was highly unlikely and improbable that someone else could have made and placed the pomelo bomb outside the front of the apartment which had caused the fire and explosion upon being triggered off by the lifting up of one of the two pomelos by GYS and the deaths of the two deceased persons.

[365] At the conclusion of the trial, I was, therefore, satisfied that the defence had failed to cast a reasonable doubt on the prosecution case.

[366] I was, consequently, satisfied that the prosecution had proven the two counts of murder against the accused beyond reasonable doubt as I was satisfied that within all probability the act must have been done by the accused and the accused alone. I, therefore, found the accused guilty as charged for the two counts of murder (P2). I sentenced the accused, accordingly, to the only sentence provided by the law under s. 302 of the Penal Code, ie, the mandatory death penalty, in respect of each of the two counts of murder. In accordance with s. 277 of the CPC I also ordered that the accused be hung by the neck until he is dead.

Conclusion

[367] In view of the reasons as set out above, the court did not entertain any doubt whatsoever that it was the accused who had intentionally caused the death of NSH and unintentionally caused

A the death of GYS by first making and then leaving the pomelo bomb in front of the apartment where NSH and PW9 were residing at the material time with the full knowledge that if NSH and/or PW9 were to lift up either one or both the pomelos, the mechanism in the pomelo bomb would cause it to explode and to
B cause injuries of such severity and gravity as to cause their deaths.

[368] In my judgment, the fact that it was not NSH or PW9 who had lifted up one of the pomelos but it was GYS who did so and the fact that it was the deaths of NSH and GYS which
C were caused instead of the deaths of NSH and PW9, did not in any way reduce the culpability of the accused for the two offences of murder by virtue of s. 299, s. 300 and s. 301 of the Penal Code.

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